

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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(3)

613

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

K-SIX TELEVISION, INC.,

Intervenor.

On Appeal From Order of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 20 1965

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SOUTHWESTERN OPERATING COMPANY,

Appellant,

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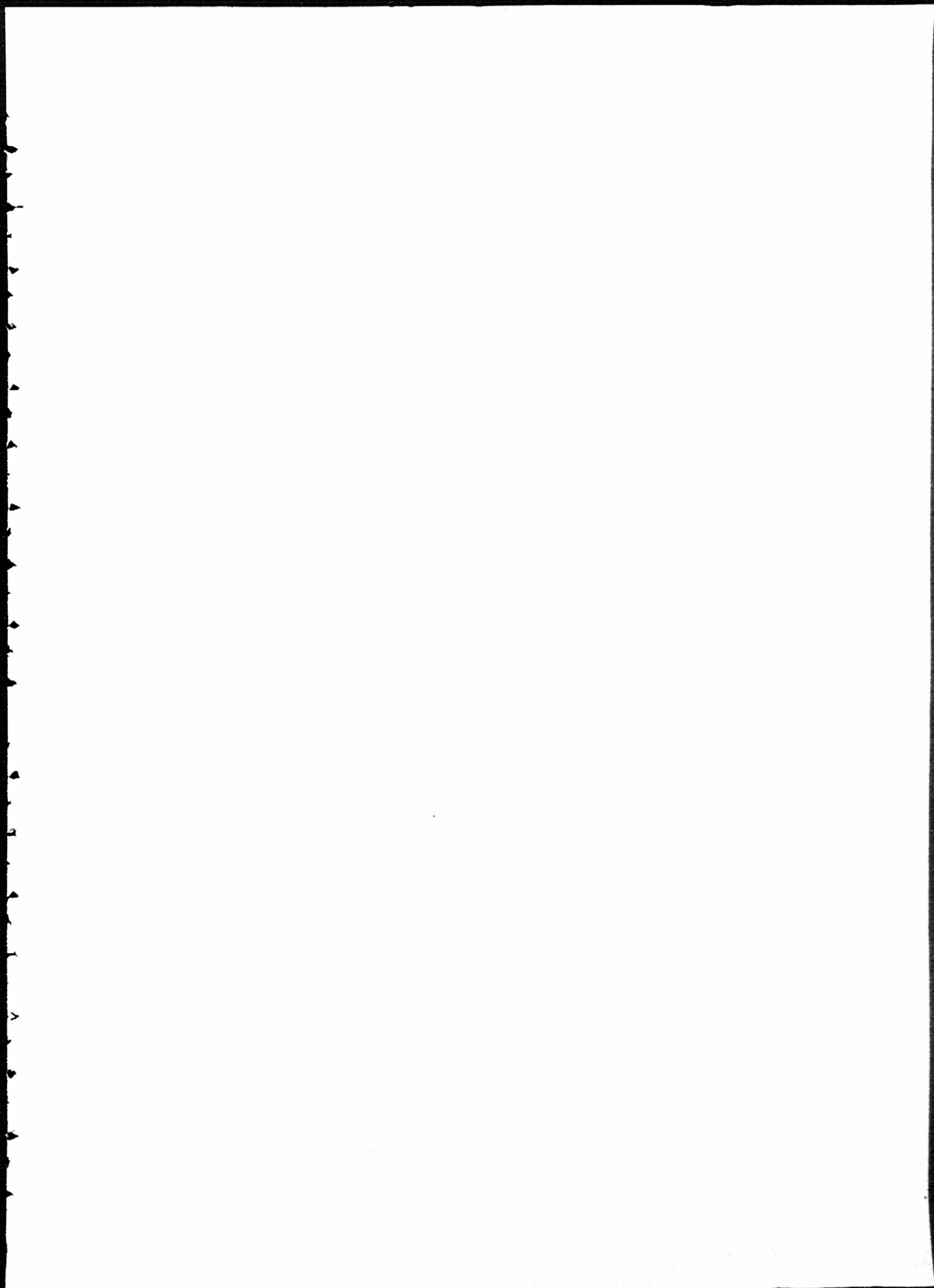
On Appeal From Order of the
Federal Communications Commission

JOINT APPENDIX

(i)

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[R. 1]

[Rec'd-FCC-Feb. 17, 1964]

K Z T V

CHANNEL 10

Corpus Christi, Texas

Show Room Building

Tu 3-5415

February 14, 1964

Secretary
Federal Communications Commission
Washington 25, D. C.

Dear Sir:

Transmitted herewith is an application for a new television station on Channel 13 in Laredo, Texas, submitted for filing by K-SIX Television, Inc., licensee of KZTV, Corpus Christi, Texas.

Concurrent application is being filed for FAA clearance of the proposed new station tower. The applicant requests herein a waiver of the requirement in section 3.613 of the Rules, in order that its main studio may be located on the transmitter site which is outside the city limits of Laredo.

A grant of the facilities requested would provide Laredo with its second television station.

Respectfully submitted,

K-SIX TELEVISION, Inc.

By: /s/ Vann M. Kennedy
President

VMK:bt

Enclosures: 3 copies FCC Form 301
2 copies Section V-G

Broadcast Application		FEDERAL COMMUNICATIONS COMMISSION		Section III	
FINANCIAL QUALIFICATIONS OF BROADCAST APPLICANT		Name of Applicant K-SIX Television, Inc. KZTV Corpus Christi, Texas			
The Commission is seeking in the questions that follow information as to contracts and arrangements now in existence, as well as any arrangements or negotiations, written or oral, which relate to the present or future financing of the station; the questions must be answered in the light of this instruction.					
1. a. Give estimated initial costs of making installation for which application is made. If performed under a contract for the completed work, the facts as to such contract must be stated in lieu of estimates as to the several items. In any event, the cost shown must be the costs in place and ready for service, including the amounts for labor, supervision, materials, supplies and freight. Cost items such as professional fees, mobile equipment, non-technical studio furnishings, etc. should be included under "Other Items" below.					
Transmitter proper including tubes		Antenna system, including antenna-ground system, coupling equipment, transmission line		Frequency and modulation monitors	
\$ 63,700 ^{65,000}		\$ 48,140*		\$ 5,500*	
				Studio technical equipment, microphones, transcription equipment, etc. \$ 53,953*	
Acquiring land To be leased		Acquiring, remodeling, or constructing buildings		Other items itemize	
		\$ 25,000		\$ 42,567*#	
				Total 740,860 \$ 238,860*	
				Give estimated cost of operation for first year \$ 37,000	
				Give estimated revenues for first year \$ None	
b. State the basis of the estimates in (a) above. Quotations from manufacturers and applicant's experience in television.					
*Includes items on hand. See attachment.					
#"Other items": Microwave equipment \$30,567; furnishings and props \$2,000; professional fees, contingencies \$10,000					
c. The proposed construction is to be financed and paid for in the following manner (including specified statements as to the approximate amount to be met and paid for from each source.) The financial plan should provide for any additional construction costs should the actual cost exceed the original estimated cost, and also for the early operation of the station in the event operating expenses should exceed operating revenues:					
Existing Capital		New Capital		Loans from banks or others	
See Exhibit 3		\$ None		\$ None	
				Profits from existing operations \$ None	
				Donations \$ None	
				Credit, deferred payments, etc. See Exhibit 5	
				Other sources (specify) \$ None	
2. a. Attach as Exhibit No. 3 a detailed balance sheet of applicant as at the close of a month within 90 days of the date of the application showing applicant's financial position. If the status and composition of any assets and liabilities on the balance sheet are not clearly defined by their respective titles, attach as Exhibit No. 4 schedules which give a complete analysis of such items.					
b. Attach as Exhibit No. 4 a statement showing the yearly net income, after Federal income tax, for each of the past 2 years, received by applicant from the various types of activity in which he was engaged or from any other source.					
3. Furnish the following information with respect to the applicant only. If the answer is "None" to any or all items, specify so state:					
a. Amount of funds on deposit in bank or other depository				b. Name and address of the bank in which deposited	
At January 1, 1964 \$301,957.98				See attachment	
c. Name and address of the party in whose name the money is deposited K-SIX Television, Inc. KZTV Corpus Christi, Texas					
d. Conditions of deposit (in trust, savings, subject to check, on time deposit, who may draw on account and for what purpose, or other condition) Subject to check; may be drawn on for corporate purposes by corporation officers.					
e. Whether the funds were deposited for the specific purpose of constructing and operating the station No					

Broadcast Application		FEDERAL COMMUNICATIONS COMMISSION		Section IV
STATEMENT OF PROGRAM SERVICE OF BROADCAST APPLICANT		Name of applicant K-SIX Television, Inc. KZTV Corpus Christi, Texas		
NOTICE TO ALL APPLICANTS				
The replies to the following questions constitute a representation of programming policy upon which the Commission will rely in considering the application. It is not expected that licensee will or can adhere inflexibly in day-to-day operation to the representation here made. However, since such representation will constitute, in part, the basis upon which the Commission acts on the application, time and care should be devoted to the preparation of the replies so that they will reflect accurately applicant's responsible judgment of his proposed programming policy.				
INSTRUCTIONS				
1. Paragraphs 1 to 4 are divided into a left-hand column which pertains to past operation and a right-hand column which pertains to proposed operation. Applicants for new stations or assignees or transferees of existing stations are to fill in only the right-hand column while applicants for authorizations for renewal of existing station licenses are to fill in both columns. 2. Program data on past performance are to be based on the composite week for the year preceding the date of application except in the case of renewal applications where the year preceding the expiration date of the existing license is to be used. The days comprising the composite week of each year will be designated by public notice on or about November 15th of that year. 3. Program classifications incident to the replies to Paragraphs 2, 3, and 4 below, are to be in accordance with the definitions on Page 4 of this Section. 4. Assignees or transferees filing FCC Form 314 or 315 need not complete paragraphs 5 or 8.				
PAST OPERATION		PROPOSED OPERATION (for a typical week)		
1. (a) State actual minimum weekly schedule of operation under the present authorization, giving opening and closing time and total hours for weekdays and Sunday. <div style="text-align: center; padding: 20px;">Does not apply</div>		(b) State minimum weekly schedule of operation proposed by licensee, permittee, assignee or transferee, giving opening and closing time and total hours for weekdays and Sunday. <div style="text-align: center; padding: 20px;">See attachment</div>		
2. (a) State for the composite week the percentage of time which was devoted to each of the following types of programs (totals to equal 100%). (1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.) % (2) Religious (include here all sermons, religious news, music, and drama, etc.) % (3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population) % (4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below) % (5) News (include here news reports and commentaries) % (6) Discussion (include here forum, panel and round-table programs) % (7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports) % (8) % (9) % (10) Miscellaneous % <div style="text-align: right;">100</div>		(b) State the percentage of time to be devoted to each of the following types of programs for a proposed typical week of operation under the authorization requested (totals to equal 100%). Attach program schedule for this proposed typical week and indicate thereon the class of each program in accordance with paragraph 4(b). (1) Entertainment (include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.) <u>75.83</u> % (2) Religious (include here all sermons, religious news, music, and drama, etc.) <u>2.57</u> % (3) Agricultural (include here all programs containing farm or market reports or other information specifically addressed to the agricultural population) <u>1.74</u> % (4) Educational (include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below) <u>2.04</u> % (5) News (include here news reports and commentaries) <u>11.70</u> % (6) Discussion (include here forum, panel and round-table programs) <u>1.36</u> % (7) Talks (include here all conversation programs which do not fall under Points (2), (3), (4), (5), or (6) above, including sports) <u>4.76</u> % (8) % (9) % (10) Miscellaneous % <div style="text-align: right;">100</div>		

Section IV
Attachment
Para. 1 (b)

State minimum weekly schedule of operation proposed by licensee giving opening and closing time and total hours for weekdays and Sunday.

<u>Day</u>	<u>Sign on</u>	<u>Sign Off</u>	<u>Total Time</u>
Sunday	10:00 AM	12:00 M	14 hours
Monday	7:00 AM	11:40 PM	16 hours, 40 min.
Tuesday	7:00 AM	11:40 PM	16 hours, 40 min.
Wednesday	7:00 AM	11:40 PM	16 hours, 40 min.
Thursday	7:00 AM	12:10 AM	17 hours, 10 min.
Friday	7:00 AM	11:40 PM	16 hours, 40 min.
Saturday	11:30 AM	12:00 M	12 hours, 30 min.

Total: 110 hours, 20 minutes.

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SECTION IV
ATTACHMENT
PARA. 2 (b)

PROGRAM SCHEDULE
Proposed Typical Week

SUNDAY		<u>CLASS</u>	<u>TYPE</u>
10:00 AM	Laredo Round Table	LS	D
10:30	Servisios Religioso en Espanol	LS	R
11:00	La Voz del Seglar Catolico	LS	R
11:30	Border Press Conference	LS	N
12:00	Jungle Theatre	NS	E
1:30 PM	Sports Spectacular	NC	T
3:00	One of a Kind	NS	D
4:00	Alumni Fun	NC	Ed
4:30	Amateur Hour	NC	E
5:00	Twentieth Century	NC	E
5:30	Sea Hunt	NC	E
6:00	Lassie	NC	E
6:30	My Favorite Martian	NC	E
7:00	Ed Sullivan	NC	E
8:00	Judy Garland	NC	E
9:00	Candid Camera	NC	E
9:30	What's My Line	NC	E
10:00	Ten Star Final News	NC	N
10:15	Radar Weather	NS	A
10:20	Playhouse 90	NS	E
11:50	Almanac Newsreel	NS	N
11:55	Prayer for Tomorrow	RS	R
12:00	Sign Off		

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SECTION IV
ATTACHMENT
PARA. 2 (b)

MONDAY		<u>CLASS</u>	<u>TYPE</u>
7:00 AM	Laredo Chapel	LS	R
7:15	Ingles Poco a Poco	LS	Ed
7:30	Laredo Daybook	LS	N
7:45	Big 10 Cartoons	NS	E
8:00	Captain Kangaroo	NC	E
9:00	CBS Morning News	NC	N
9:30	I Love Lucy	NC	E
10:00	The McCoys	NC	E
10:30	Pete and Gladys	NC	E
11:00	Love of Life	NC	E
11:25	Consult Dr. Brothers	NS	T
11:30	Search for Tomorrow	NC	E
11:45	Guiding Light	NC	E
12:00	Ten Star Photo News	NS	N
12:10 PM	RFD 10 Radar Weather	NS	A
12:15	Kartoon Klub	NS	E
12:30	As the World Turns	NC	E
1:00	Password	NC	E
1:30	House Party	NC	E
2:00	To Tell The Truth	NC	E
2:25	CBS News	NC	N
2:30	Edge of Night	NC	E
3:00	Secret Storm	NC	E
3:30	Life of Riley	NS	E
4:00	Popeye Theatre	NC	E
4:30	Big Ten Cartoons	NC	E
5:00	Yogi Bear	NC	E
5:30	CBS Evening News	NC	N
6:00	South Texas Today	NC	N
6:15	Radar Weather	NS	A
6:20	Photo Ten News	NC	N
6:30	To Tell The Truth	NC	E
7:00	I've Got a Secret	NC	E
7:30	Lucy Show	NC	E
8:00	Danny Thomas	NC	E
8:30	Andy Griffith Show	NC	E
9:00	I'm Dickens, He's Fenster	NC	E
9:30	Naked City	NS	E
10:00	Ten Star Final News	NC	N
10:15	Radar Weather	NS	A
10:20	Ten Star Sports	NC	T
10:30	Combat		E
11:30	Almanac Newsreel	NC	N
11:35	Prayer for Tomorrow	RS	R
11:40	Sign Off		

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SECTION IV
ATTACHMENT
PARA. 2 (b)

TUESDAY		<u>CLASS</u>	<u>TYPE</u>
7:00 AM	Laredo Chapel	LS	R
7:15	Ingles Poco a Poco	LS	Ed
7:30	Laredo Daybook	LS	N
7:45	Big 10 Cartoons	NS	E
8:00	Captain Kangaroo	NC	E
9:00	CBS Morning News	NC	N
9:30	I Love Lucy	NC	E
10:00	The McCoys	NC	E
10:30	Pete and Gladys	NC	E
11:00	Love of Life	NC	E
11:25	Consult Dr. Brothers	NS	T
11:30	Search for Tomorrow	NC	E
11:45	Guiding Light	NC	E
12:00	Ten Star Photo News	NS	N
12:10 PM	RFD 10 Radar Weather	NS	A
12:15	Kartoon Klub	NS	E
12:30	As the World Turns	NC	E
1:00	Password	NC	E
1:30	House Party	NC	E
2:00	To Tell the Truth	NC	E
2:25	CBS News	NC	N
2:30	Edge of Night	NC	E
3:00	Secret Storm	NC	E
3:30	Life of Riley	NS	E
4:00	Popeye Theatre	NC	E
4:30	Big Ten Cartoons	NC	E
5:00	Woody Woodpecker	NC	E
5:30	CBS Evening News	NC	N
6:00	South Texas Today	NC	N
6:15	Radar Weather	NS	A
6:20	Photo Ten News	NC	N
6:30	McHale's Navy	NC	E
7:00	Red Skelton	NC	E
8:00	Petticoat Junction	NC	E
8:30	Jack Benny	NC	E
9:00	Garry Moore	NC	E
10:00	Ten Star Final News	NC	N
10:15	Radar Weather	NS	A
10:20	Ten Star Sports	NC	T
10:30	East Side, West Side	NC	E
11:30	Almanac Newsreel	NS	N
11:35	Prayer for Tomorrow	RS	R
11:40	Sign Off		

SECTION IV
ATTACHMENT
PARA. 2 (b)

WEDNESDAY		<u>CLASS</u>	<u>TYPE</u>
7:00 AM	Laredo Chapel	LS	R
7:15	Ingles Poco a Poco	LS	Ed
7:30	Laredo Daybook	LS	N
7:45	Big 10 Cartoons	NS	E
8:00	Captain Kangaroo	NC	E
9:00	CBS Morning News	NC	N
9:30	I Love Lucy	NC	E
10:00	The McCoys	NC	E
10:30	Pete and Gladys	NC	E
11:00	Love of Life	NC	E
11:25	Consult Dr. Brothers	NS	T
11:30	Search for Tomorrow	NC	E
11:45	Guiding Light	NC	E
12:00	Ten Star Photo News	NS	N
12:10 PM	RFD 10 Radar Weather	NS	A
12:15	Kartoon Klub	NS	E
12:30	As the World Turns	NC	E
1:00	Password	NC	E
1:30	House Party	NC	E
2:00	To Tell the Truth	NC	E
2:25	CBS News	NC	N
2:30	Edge of Night	NC	E
3:00	Secret Storm	NC	E
3:30	Life of Riley	NS	E
4:00	Popeye Theatre	NC	E
4:30	Big Ten Cartoons	NC	E
5:00	Circus Boy	NC	E
5:30	CBS Evening News	NC	N
6:00	South Texas Today	NC	N
6:15	Radar Weather	NS	A
6:20	Photo Ten News	NC	N
6:30	Maverick	RC	E
7:30	Tell It To The Camera	NC	T
8:00	Beverly Hillbillies	NC	E
8:30	Dick Van Dyke Show	NC	E
9:00	Danny Kaye	NC	E
10:00	Ten Star Final News	NC	N
10:15	Radar Weather	NS	A
10:20	Ten Star Sports	NC	T
10:30	Bat Masterson	NS	E
11:00	Peter Gunn	NS	E
11:30	Almanac Newsreel	NS	N
11:35	Prayer for Tomorrow	RS	R
11:40	Sign Off		

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SECTION IV
ATTACHMENT
PARA. 2 (b)

THURSDAY		CLASS	TYPE
7:00 AM	Laredo Chapel	LS	R
7:15	Ingles Poco a Poco	LS	Ed
7:30	Laredo Daybook	LS	N
7:45	Big 10 Cartoons	NS	E
8:00	Captain Kangaroo	NC	E
9:00	CBS Morning News	NC	N
9:30	I Love Lucy	NC	E
10:00	The McCoys	NC	E
10:30	Pete and Gladys	NC	E
11:00	Love of Life	NC	E
11:25	Consult Dr. Brothers	NS	T
11:30	Search for Tomorrow	NC	E
11:45	Guiding Light	NC	E
12:00	Ten Star Photo News	NS	N
12:10 PM	RFD 10 Radar Weather	NS	A
12:15	Kartoon Klub	NS	E
12:30	As the World Turns	NC	E
1:00	Password	NC	E
1:30	House Party	NC	E
2:00	To Tell the Truth	NC	E
2:25	CBS News	NC	N
2:30	Edge of Night	NC	E
3:00	Secret Storm	NC	E
3:30	Life of Riley	NS	E
4:00	Popeye Theatre	NC	E
4:30	Big Ten Cartoons	NC	E
5:00	Huckleberry Hound	NC	E
5:30	CBS Evening News	NC	N
6:00	South Texas Today	NC	N
6:15	Radar Weather	NS	A
6:20	Photo Ten News	NC	N
6:30	Password	NC	T
7:00	Rawhide	NC	E
8:00	Perry Mason	NC	E
9:00	The Nurses	NC	E
10:00	Ten Star Final News	NC	N
10:15	Radar Weather	NS	A
10:20	Ten Star Sports	NC	T
10:30	Movie	NS	E
12:00	Almanac Newsreel	NS	N
12:05	Prayer for Tomorrow	RS	R
12:10	Sign Off		

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SECTION IV
ATTACHMENT
PARA. 2 (b)

	FRIDAY	<u>CLASS</u>	<u>TYPE</u>
7:00 AM	Laredo Chapel	LS	R
7:15	Ingles Poco a Poco	LS	Ed
7:30	Laredo Daybook	LS	N
7:45	Big 10 Cartoons	NS	E
8:00	Captain Kangaroo	NC	E
9:00	CBS Morning News	NC	N
9:30	I Love Lucy	NC	E
10:00	The McCoys	NC	E
10:30	Pete and Gladys	NC	E
11:00	Love of Life	NC	E
11:25	Consult Dr. Brothers	NS	T
11:30	Search for Tomorrow	NC	E
11:45	Guiding Light	NC	E
12:00	Ten Star Photo News	NS	N
12:10 PM	RFD 10 Radar Weather	NS	A
12:15	Kartoon Klub	NS	E
12:30	As the World Turns	NC	E
1:00	Password	NC	E
1:30	House Party	NC	E
2:00	To Tell the Truth	NC	E
2:25	CBS News	NC	N
2:30	Edge of Night	NC	E
3:00	Secret Storm	NC	E
3:30	Life of Riley	NS	E
4:00	Popeye Theatre	NC	E
4:30	Big Ten Cartoons	NC	E
5:00	Top Cat	NC	E
5:30	CBS Evening News	NC	N
6:00	South Texas Today	NC	N
6:15	Radar Weather	NS	A
6:20	Photo Ten News	NC	N
6:30	The Great Adventure	NC	E
7:30	Route 66	NC	E
8:30	Twilight Zone	NC	E
9:00	Alfred Hitchcock	NC	E
10:00	Ten Star Final News	NC	N
10:15	Radar Weather	NS	A
10:20	Ten Star Sports	NC	T
10:30	Jungle Jim	NS	E
11:00	Bat Masterson	NS	E
11:30	Almanac Newsreel	NS	N
11:35	Prayer for Tomorrow	RS	R
11:40	Sign Off		

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SECTION IV
ATTACHMENT
PARA. 2 (b)

SATURDAY		<u>CLASS</u>	<u>TYPE</u>
11:30 AM	Farm & Ranch	LS	A
12:00	CBS News	NS	N
12:30 PM	Big 10 Cartoons	NS	E
1:00	Buccaneers	RS	E
1:30	Bat Masterson	RS	E
2:00	Southwest Conference Basketball	NC	T
4:00	Pan Americana	LS	Ed
4:30	Rin Tin Tin	NC	E
5:00	Roy Rogers	NC	E
5:30	Sky King	NC	E
6:00	Mr. Ed	NC	E
6:30	Jackie Gleason	NC	E
7:30	The Defenders	NC	E
8:30	Phil Silvers	NC	E
9:00	Gunsmoke	NC	E
10:00	Ten Star Final News	LC	N
10:15	Radar Weather	LS	A
10:20	Saturday Nite Movie	NC	E
11:20	Peter Gunn	RS	E
11:50	Almanac Newsreel	RS	N
11:55	Prayer for Tomorrow	LS	R
12:00 M	Sign Off		

Broadcast Application

STATEMENT OF PROGRAM SERVICE

Section IV, Page 2

3. (a) Dividing the broadcast week into 15 minute periods, specify below the number of 1½ minute periods within such 15 minute periods during the composite week in which were broadcast (exclusive of non-commercial spot announcements, call letter announcements and promotional announcements for sustaining programs):

Does not apply

No. of 1½ minute periods

- (1) No spot announcements or commercial continuity
(2) One spot announcement
(3) Two spot announcements
(4) Three spot announcements
(5) Four spot announcements
(6) Five or more spot announcements

Total number of 1½ minute periods

State the number of spot announcements (exclusive of non-commercial spot and call letter announcements, and promotional announcements for sustaining programs) broadcast during the

composite week which exceeded one minute in length
(See definition of spot announcement)

(b) State what the practice of the station will be with respect to the number and length of spot announcements allowed in a given period.

General policy will be to schedule not more than 3 commercial spot announcements in a quarter-hour period, exclusive of station break announcements, and to limit spot announcements to 1 minute in length.

In the tables below the percentages for each segment are to be computed on the basis of 100 percent of the operating hours within the particular segment for the seven days comprising the composite week (i.e., if full time operation, 70 hours for the 8 a.m. to 6 p.m. segment, 35 hours for the 6 p.m. to 11 p.m. segment, and the total weekly hours of operation between 11 p.m., and 8 a.m. for the third segment). The percentages in the column headed "Total" are to be computed on the basis of 100 percent of operating hours for the seven days.

The exact number of spot announcements should be stated, including those broadcast within participating programs, but excluding call letter announcements (call letters and location) and promotional announcements for sustaining programs.

NOTE: The purpose of the following tabulation is to enable the Commission to secure quantitative data as to the proportion of time (to be) devoted to the various classes of programs. The function of each class of program as part of a diversified program structure is discussed in the Commission's Report of March 7, 1946, entitled "Public Service Responsibility of Broadcast Licensees".

(a) State the percentage of time which was devoted to each of the following classes of programs during the composite week.

Does not apply

PROGRAM LOG ANALYSIS
(in percentages)

8 a.m.- 6 p.m.	6 p.m.- 11 p.m.	All other hours	Total
-------------------	--------------------	-----------------------	-------

- | | | | | |
|---|------|------|------|------|
| (1) Network commercial (NC) | | | | |
| (2) Network sustaining (NS) | | | | |
| (3) Recorded commercial (RC) | | | | |
| (4) Recorded sustaining (RS) | | | | |
| (5) Wire commercial (WC) | | | | |
| (6) Wire sustaining (WS) | | | | |
| (7) Live commercial (LC) | | | | |
| (8) Live sustaining (LS) | | | | |
| (9) Total commercial
(1+3+5+7) | | | | |
| (10) Total sustaining
(2+4+6+8) | | | | |
| (11) Complete Total | 100% | 100% | 100% | 100% |
| (12) Actual broadcast hours
(per week) | | | | |
| (13) No. of spot announcements (SA) (per week) | | | | |
| (14) No. of non-commercial spot announcements (NCSA) (per week) | | | | |

(b) Show in the table below the percentage of time proposed to be devoted to each of the following classes of programs during a proposed typical week of operation.

See attachment

PROGRAM LOG ANALYSIS
(in percentages)

8 a.m.- 6 p.m.	6 p.m.- 11 p.m.	All other hours	Total
-------------------	--------------------	-----------------------	-------

- | | | | | |
|---|------|------|------|------|
| (1) Network commercial (NC) | | | | |
| (2) Network sustaining (NS) | | | | |
| (3) Recorded commercial (RC) | | | | |
| (4) Recorded sustaining (RS) | | | | |
| (5) Wire commercial (WC) | | | | |
| (6) Wire sustaining (WS) | | | | |
| (7) Live commercial (LC) | | | | |
| (8) Live sustaining (LS) | | | | |
| (9) Total commercial
(1+3+5+7) | | | | |
| (10) Total sustaining
(2+4+6+8) | | | | |
| (11) Complete Total | 100% | 100% | 100% | 100% |
| (12) Proposed broadcast hours
(per week) | | | | |
| (13) No. of spot announcements (SA) (per week) | | | | |
| (14) No. of non-commercial spot announcements (NCSA) (per week) | | | | |

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Section IV
Attachment
Para. 4 (b)

Proposed
PROGRAM LOG ANALYSIS
(in percentages)

	<u>8 AM- 6 PM</u>	<u>6 PM- 11 PM</u>	<u>All Other Hours</u>	<u>Total</u>
Network Commercial	84.63	89.52	26.15	80.44
Network Sustaining	10.72	10.48	33.85	12.92
Recorded Sustaining	-----	-----	5.38	.52
Live Sustaining	4.65	-----	34.62	6.12
Total Commercial	84.63	89.52	26.15	80.44
Total Sustaining	<u>15.37</u>	<u>10.48</u>	<u>73.85</u>	<u>19.56</u>
Complete Total	100.00%	100.00%	100.00%	100.00%
Proposed Broadcast hours per week	64-1/2	35	10' 50"	110' 20"
No. spot announcements per week	450	190	51	691
No. non-commercial spot announcements per week	100	14	100	214

Applicant plans to re-broadcast a large portion of the daily program schedule of KZTV, Corpus Christi, Texas. All such programming is classified as "Network", in accordance with the Commission's program classifications (Section IV, page 4).

Broadcast Application		STATEMENT OF PROGRAM SERVICE		Section IV, Page 3	
<p>5. (a) Attach as Exhibit No. _____ the original or one exact copy of the program log for the seven days comprising the composite week analyzed in the preceding paragraphs. (If original logs are submitted they will be returned.) Does not apply</p> <p>(b) What year's composite week has been analyzed in the foregoing paragraphs? Does not apply</p>		<p>8. If this application is for an FM authorization, will the programs of any AM station operating in the same area be duplicated? If the answer is yes, Does not apply</p> <p>(a) How many hours per day will be devoted to duplicated programs? Does not apply</p> <p>(b) Call letters and location of the AM station</p> <p>Does not apply</p>			
<p>6. Will the proposed station be affiliated with any network? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If the answer is "Yes", give the name of the network.</p> <p>CBS Television</p>		<p>(c) What kinds of programs (musical, sports, etc.) will be duplicated?</p> <p>Does not apply</p>			
<p>7. Attach as Exhibit No. 6 a narrative statement on the policy to be pursued with respect to making time available for the discussion of public issues, including illustrations of the types of programs to be broadcast and the methods of selection of subjects and participants.</p>		<p>9. State the average number of hours per week which will be used in advertising or promoting any business, profession or activity other than broadcasting in which the applicant is engaged or financially interested either directly or indirectly. If this is an application for renewal of license, show this data for the past license period also.</p> <p>None</p>			
		<p>10. If the data furnished in response to the questions in this Section IV do not in the applicant's opinion adequately reflect station operation, attach as Exhibit No. 7 a statement setting forth any additional program data that the applicant desires to call to the Commission's attention. (If the applicant feels that the program material classified in Paragraph 2 is susceptible of classifications other than those listed he may supplement Paragraph 2 with an explanatory statement in this Exhibit.)</p>			
		<p>11. If this application is for a television authorization, will programs be broadcast in color? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> If "Yes", will programs be: Network <input type="checkbox"/> Local Live <input type="checkbox"/> Local Slide <input type="checkbox"/></p>			
<p>12. State applicant's general plans for staffing the station, including the number of employees in each department (i.e. program, commercial, technical, etc.), and the names, residence and citizenship of the general manager, station manager, program director and other department heads who have been employed or whom the applicant expects to employ.</p> <p>Vann M. Kennedy, General Manager, Corpus Christi, Texas, who will continue management of KZTV and KSIX. U.S. Citizen.</p> <p>Dale Taylor, Chief Engineer, Corpus Christi, Texas, who will continue in this capacity with KZTV. U.S. Citizen.</p> <p>Eric M. Beals, Resident Manager and Local Chief Engineer, Corpus Christi, Texas. U.S. Citizen.</p> <p>One newsman-announcer, one engineer-announcer, two studio technicians and two engineers.</p>					

PROGRAM CLASSIFICATION

A commercial program (C) is any program the time for which is paid for by a sponsor or any program which is interrupted by a spot announcement (as defined below), at intervals of less than 14 1/2 minutes. A network program shall be classified as "commercial" if it is commercially sponsored on the network, even though the particular station is not paid for carrying it--unless all commercial announcements have been deleted from the program by the station. Cooperative programs furnished to its affiliates by a network which are available for local sponsorship are network sustaining programs (NS) if no local sponsorship is involved and are network commercial programs (NC) where there is local sponsorship even though the commercial announcement is made by the station's local announcer.

(It will be noted that any 14 1/2 minute segment of a program which is interrupted by a commercial announcement is classified as a commercial program, even though the purchaser of the interrupting announcement has not also purchased the time preceding and following. The result is to classify so called "participating" programs as commercial. Without such a rule, a 15-minute program may contain 5 or even more minutes of advertising and still be classified as "sustaining". Under the proposed definition, a program may be classified as "sustaining" although preceded and followed by spot announcements, but if a spot announcement interrupts a program, the 14 1/2 minute segment so interrupted must be classified as "commercial.")

A sustaining program (S) is any program which is neither paid for by a sponsor nor interrupted by a spot announcement (as defined below.)

A network program (N) is any program furnished to the station by a network or another station. Delayed broadcasts of transcribed programs or films, originated by networks are classified as "network" not "recorded." Cooperative programs furnished to its affiliates by a network which are available for local sponsorship are network sustaining programs (NS) if no local sponsorship is involved and are network commercial programs (NC) where there is local sponsorship even though the commercial announcement is made by the station's local announcer. Programs are classified as network whether furnished by a nationwide, regional, or special network or by another station.

A recorded program (R) is any program which uses phonograph records, electrical transcriptions, films, or other means of mechanical reproduction in whole or in part--except where the recording is wholly incidental to the program and is limited to background sounds, sound effects, identifying themes, musical "bridges", etc. A program part transcribed or recorded and part live is classified as "recorded" unless the recordings are wholly incidental, as above. A transcribed delayed broadcast of a network program, however, is not classified as "recorded" but as "network." A recorded or filmed program which is a local live program produced by the station and recorded for later broadcasting by the station shall be considered a local live program.

A wire program (W) is any program the text of which is distributed to a number of stations by telegraph, teletype, or similar means, and read in whole or in part by a local announcer. Programs distributed by the wire news services are "wire" programs. A news program which is part wire and in part of non-syndicated origin is classified as "wire" if more than half of the program is usually devoted to the reading verbatim, or virtually verbatim, of the syndicated wire text, and otherwise is classified as "live."

A local live program (L) is any local program which uses live talent exclusively, whether originating in the station's studios or by remote control. Programs furnished to a station by a network or another station, however, are not classified as "live" but as "network." A program which uses recordings in whole or in part, except in a wholly incidental manner, should not be classified as "live" but as "recorded." Wire programs, as defined above, should likewise not be classified as "live." A recorded program which is a local live program produced by the station and recorded for later broadcasting by the station shall be considered a local live program.

A non-commercial spot announcement (NCSA) is an announcement which is not paid for by a sponsor and which is devoted to a non-profit cause--e.g., war bonds, Red Cross, public health, civic announcements, etc. Promotional announcements should be classified as "non-commercial spot announcements" if the program promoted is a sustaining program; other promotional announcements should be classified as "spot announcements." Participating announcements should not be classified as "non-commercial spot announcements" but as "spot announcements." War bond, Red Cross, civic and similar announcements for which the station receives remuneration should not be classified as "non-commercial spot announcements" but as "spot announcements."

A spot announcement (SA) is any announcement which is neither a non-commercial spot announcement (as above defined) nor a station identification announcement (call letters and location). An announcement should be classified as a "spot announcement," whether or not the station receives remuneration, unless it is devoted to a non-profit cause. Sponsored time signals, sponsored weather announcements, etc. are spot announcements. Unsponsored time signals, weather announcements, etc., are program matter and not classified as announcements. Station identification announcements should not be classified as either non-commercial spot announcements or spot announcements, if limited to call letters, location and identification of the licensee and network. Commercial continuity on sponsored programs is not classified as spot announcements.

The Applicant proposes an additional television service for Laredo, Texas, which now has only one station, KGNS-TV, Channel 8. The proposed new station would provide the area with the complete program schedule of the CBS Television Network, plus worthwhile regional and local programming.

Because the Laredo market cannot support two commercial television stations at the present time, the Applicant proposes large duplication of programs from KZTV, Corpus Christi, Texas, by off-the-air pickup and re-broadcast. Initially, local originations on Channel 13 at Laredo would constitute 7 hours and 15 minutes of the proposed program schedule, and these programs would be primarily of a public service nature. As the operation of the proposed station develops, it is expected that local originations would be increased. However, the station would probably continue to re-broadcast CBS programs from KZTV, and any other programs which would be of regional interest. Program changes will be made to meet changing needs of the area.

The Applicant is providing for adequate studio facilities and equipment to service the community. With approval of the Commission, the main studio would be established at the transmitter site, which is 1.9 miles East-Southeast of the City Limits of Laredo on the Wormser Road, a location easily accessible to the public.

In consideration of these factors, it is respectfully requested that the Commission grant a waiver of the requirements of Section 3.613 of its Rules and Regulations, in order that the main studio may be located at the transmitter site proposed herein.

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EXHIBIT E 1

Application for
New Television Broadcast Station
Channel 13, Laredo, Texas
K-SIX Television, Inc.

ENGINEERING STATEMENT

The application of K-SIX Television, Inc., for a new television station to serve Laredo, Texas, on Channel 13 is supported by the attached Sections V-C and V-G of FCC Form 301 and attached exhibits. The sections and exhibits have been prepared in compliance with the Commission's Rules and Regulations governing television broadcast stations.

The proposed station would operate with an effective radiated power of 21.9 kw visual and 10.95 kw aural from an antenna height above average terrain of 419 feet. The proposed site is located on a prominent height near the principal city, 1.9 miles East-Southeast on Wormser Road. Exhibit E 11B is an enlargement of the two-mile area around the site. Exhibit E 10 is a plot plan showing the location.

Exhibit E 8 is a portion of the Corpus Christi Sectional Aeronautical Chart showing the predicted 77dbu, Grade A and Grade B contours. Distances to the field strength contours were predicted in the manner specified in Section 3.684 of the Commission's Rules and Regulations, Subpart E.

Profile graphs and terrain elevations were compiled using information taken from maps shown in Exhibits E 11, E 11A and E 11B. Little profile information is available for the area extending into Mexico. Supplementary map Exhibit E 11A, an enlargement of the aeronautical chart used for Exhibit E 8, is used to show radials over Mexico. The entire 2 to 10-mile portion of each radial was used in obtaining average elevation as specified in the Commission's Rules and Regulations.

Program service for the proposed station would be obtained from an off-the-air pickup and microwave relay from KZTV, Ch. 10, Corpus Christi, Texas, which is 112.6 miles East of the Ch. 13 site. Facilities for live studio and film productions will also be provided.

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[Rec'd-FCC-Mar. 27, 1964]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of the Application of)	
K-SIX TELEVISION, INC.)	File No. BPCT-3304
Laredo, Texas)	
For Construction Permit to Construct a)	
New Television Broadcast Station to)	
Operate on Channel 13 at Laredo, Texas)	

EXCERPTS FROM
PETITION TO DENY

Southwestern Operating Company (herein "Southwestern"), licensee of Television Station KGNS-TV, Laredo, Texas, by its attorneys, respectfully petitions the Commission to deny the above-described application of K-Six Television, Inc. (herein "K-Six") to construct a new television broadcast station to operate on Channel 13, Laredo, Texas. Southwestern urges the Commission to designate the application for hearing on issues specified in this Petition.

This Petition is filed pursuant to the provisions of Section 309(d) of the Communications Act of 1934, as amended, and Section 1.580 of the Commission's Rules and Regulations. In this regard, the Petition is timely since public notice of the acceptance for filing of the application was given on February 26, 1964, in FCC Public Notice 47752.

* * * * *

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K-Six's Reasons for Filing the Application

13. In its application for Channel 13, K-Six evidences an awareness of the economic limitations of the Laredo market with respect to television

facilities. K-Six states: ". . . the Laredo market cannot support two commercial television stations at the present time . . ."^{7/} [Emphasis Added.]

Apparently, in view of this fact, K-Six indicates, indirectly at least, that it will not "sell time" in Laredo.^{8/} It does not follow, however, that there will not be such injury to the operation of KGNS-TV that the public interest will not suffer.

14. In view of K-Six's admitted realization that the Laredo market cannot support a second television facility, it is not unreasonable to ask why it is willing to expend roughly \$240,000 to construct the facility^{9/} and to expend another estimated \$37,000 yearly in operating the station.^{10/} This is not to imply

^{7/} See Exhibit 7 to Section IV, paragraph 10 of K-Six's application.

^{8/} The term "indirectly" is used since in its application K-Six indicates that no revenues will be obtained from its operation of Channel 13. See in this respect its response to question 1(a) of Section III of FCC Form 301.

^{9/} It is realized that a portion of its initial capital investment will involve a use of equipment presently on hand.

^{10/} It is submitted that the operating cost estimate is exceedingly low. In this respect, see pp. 38-41 hereof.

that its motives are suspect. To the contrary, K-Six obviously is seeking to protect its competitive position in Corpus Christi which it has a valid right to do — but not at the expense of the Laredo public!

15. K-Six presently operates Station KZTV in Corpus Christ. The American Research Bureau, in its 1962-1963 issue of Television Fact-book, indicates that KZTV has a total net weekly circulation of 94,900 television homes. At the present time, KZTV is one of only two stations operating in Corpus Christi, but there is a construction permit outstanding for a new station to operate on Channel 3 in that community. By use of the Laredo "satellite", K-Six obviously hopes to offset the loss of viewers which it will experience when Channel 3 begins operations. The

Laredo "satellite" will justify the continuance of the present rate structure in Corpus Christi and allow KZTV to continue to offer advertising on the same cost per thousand viewers that it presently does. This is the only logical explanation since no revenues are estimated for the Channel 13 operation.

16. It is clear that K-Six is motivated not by a desire to provide a local television service to Laredo but rather by a wish to protect its present competitive situation in Corpus Christi.

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The Laredo Economy

17. Laredo is a marginal television market. The community is located in Webb County, Texas. The 1960 census figures credit Webb County with population of 64,791 and Laredo with population of 60,678. But, the American Research Bureau indicates that Webb County has only 12,500 television homes and it indicates that KGNS-TV has a net weekly circulation of 12,300 television homes with an average daily circulation of 10,500 television homes. Few television markets in the United States are this small.

18. Laredo's economy and population have suffered a decline in the last four-year period. In 1959, Webb County was credited by the Sales Management Annual Survey of Buying Power with population of 72,000 while in 1963, the same service gave the County's population as 67,300. The corresponding figures for Laredo were 68,000 and 63,600. There has been a similar decrease in the effective buying income over the same period. In 1959, the figures were \$68,631,000 and \$62,382,000 for Webb County and Laredo, respectively, while in 1963, the respective figures for effective buying income had fallen to \$66,707,000 and \$61,239,000. ^{11/} Although total retail sales in Webb County and

^{11/} Actually, the figures released in 1963 are somewhat better than those released in 1962. Laredo is apparently recovering

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Laredo for the same period increased, this fact reflects an inflationary rise in commodities' prices rather than an increase in unit consumption.

19. The trend downward in the area's economy is also indicated by the family income figures for 1959 and 1962. In 1959, it was estimated that 42.4 percent of the families in Webb County and 42.5 percent of the families in Laredo had household incomes of less than \$2,500. In 1962, these figures were 51.1 and 51.3, respectively.^{12/} The other income categories per household and percentages were as follows:

	<u>1959</u>	<u>1962</u>
<u>\$2,500 - \$3,999</u>		
Webb County	25.7	20.3
Laredo	25.9	20.5
<u>\$4,000 - \$6,999</u>		
Webb County	21.2	18.0
Laredo	21.1	17.8
<u>\$7,000 - \$9,999</u>		
Webb County	5.4	4.8
Laredo	5.3	4.7
<u>\$10,000 and over</u>		
Webb County	5.3	5.8
Laredo	5.2	5.7

^{11/} (continued) somewhat from the economic drop which was experienced nationwide in 1959. It has not yet approached, however, a return to the 1959 level.

^{12/} In 1961, the equivalent figures were 55.5 and 55.8 percent, respectively.

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20. The foregoing figures give the distinct impression, which is, in fact, the case, that Laredo has an extremely uneven distribution of income — the only income groups showing increases in the three-year period were the lowest and the highest.

21. The economic difficulties of Laredo are real. The area has been determined by the Department of Commerce to be economically

depressed owing to chronic high unemployment. At the present time, the employment rate is 12.6 percent. In view of the area's failing economy, the Area Rehabilitation Commission has made Laredo eligible for matching federal funds. In cooperation with the ARA, Laredo has, since 1962 when it received the "depressed area" designation, made strides toward improving its situation.^{13/} The impact on the economy of the remedial measures has not been experienced yet, however, as evidenced by the extremely high unemployment rate.

Competitive Advertising Media and Communications Outlets

22. There are a number of concerns soliciting advertising revenues in Laredo. There are two local newspapers, one of

^{13/} Laredo is presently in the process of constructing a civic center and extending its water and sewage lines as the result of passage of local bond issues. Local leaders, working with federal governmental and military personnel, have been able to arrange for approximately twenty million dollars in construction projects from 1963 through 1965.

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which, The South Texas Citizen, is a weekly which publishes on Thursdays. The other, The Laredo Times, is published six days weekly. The Laredo Times is alleged to have a circulation of approximately 15,000 but the figures are not verified by the Audit Bureau of Circulation. There are two radio stations in Laredo. One of them, KGNS which operates with 500 watts, daytime only, is licensed to Southwestern. The other, KVOZ, operates with 250 watts, fulltime.

23. There are seven radio stations operating in Nuevo Laredo, Mexico — XEX, XEBK, XENU, XEFE, XEAS, XEWL, and XEGNK. All seven of the Mexican stations actively solicit business in Laredo, Texas. Their rates for spot announcements vary from a low of fifteen cents in some instances to approximately seventy cents, depending upon what the stations are able to obtain at the time. Double billing is a common practice among the Mexican stations.

24. Additionally, there is a television station operating in Nuevo Laredo which serves, of course, Laredo and solicits advertising there. The station is presently operating on Channel 11, and its licensee is constructing a facility to operate on Channel 2, also at Nuevo Laredo. On the basis of information and belief, it is alleged that Channel 2, when completed, will transmit the

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same programming as carried over Channel 11. The present advertising rates on Channel 11 vary from \$4.00 to \$8.00 per spot announcement.

25. There are three local newspapers in Nuevo Laredo, all of which are published six days a week. All of them actively solicit advertising on a daily basis in Laredo.

26. In addition to the advertising media located in Nuevo Laredo, two newspapers published in Monterrey, Mexico, actively solicit advertising in Laredo. The Monterrey television station also has salesmen in Laredo but they do not solicit business on a daily basis.

27. Since a substantial portion of Laredo's population is Spanish speaking, the impact of the Mexican firms upon the operation of KGNS-TV cannot be minimized. It is estimated that approximately \$10,000 monthly is spent by Laredo concerns on advertising with Mexican facilities.

28. Of no little importance, also, is the fact that Laredo is the location of a viable community antenna television system. Vumore Company of Laredo operates a system which transmits, through the use of an affiliated common carrier microwave concern, the signals of the three San Antonio, Texas, network affiliated television stations. It also transmits the signal

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of the San Antonio-Austin educational facility until approximately 4:00 p.m. when it "switches" to the UHF Spanish language outlet in San Antonio.^{14/} Details are not available concerning the number of subscribers which the system has. Although the 1963 issue of Television Factbook indicates that

Vumore has 1,300 subscribers in Laredo, it is believed that that figure is exceedingly low and there are actually between 2,000 and 3,000 subscribers to the CATV service. These figures represent approximately from one-sixth to one-fourth of the total television homes served by KGNS-TV in any given week.

29. The Commission needs no introduction to the competitive effects which CATV systems have on local television stations, especially in small markets such as Laredo. Southwestern has been attempting for several months to negotiate a mutually satisfactory agreement with Vumore but it has been unable to do so. Although Vumore carries KGNS-TV's signal on its system, it has refused to agree not to duplicate prior to broadcast the programming of the local television station.

30. It is realized that this is not the appropriate forum to argue what restrictions should be imposed upon a CATV

^{14/} The local CATV system is also presently carrying the signal of KGNS-TV over its facilities.

system which is causing injury to a local television station. But, the very existence of the system is significantly relevant to a consideration of K-Six's application in two important respects:

a. The Commission may take notice, as it has done in the past, that unrestrained CATV operations result in injury to local television stations.^{15/}

b. A substantial number of persons who presently receive service from KGNS-TV and who would receive service from an operation on Channel 13 receive a multiplicity of television services. In addition to the signals of KGNS-TV and the Nuevo Laredo station, subscribers to the CATV system receive three additional network services and, at any given time, an educational or Spanish language service.

31. The foregoing does not, of course, "prove" that a grant of the subject application will result in injury to the public interest. It does indicate clearly, however, that KGNS-TV is

^{15/} E.g., Notice of Proposed Rule Making in Docket No. 15233 (FCC 63-1128, 44174), released December 13, 1963.

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operating in a market with a very small number of television homes under extremely difficult competitive conditions. Under existing conditions, Southwestern is proud of the fact that it has been able to obtain a small profit from its operation of KGNS-TV since its first full fiscal year of operation and at the same time provide high quality local programming to the public which it serves.

Financial Situation of KGNS-TV

32. For the fiscal year ending February 28, 1959 (Southwestern took over the operation of KGNS-TV on September 1, 1958), KGNS-TV showed an operating loss of \$9,849.23 on revenues of \$103,664.70. The fiscal year ending February 29, 1960, showed an improvement — the net operating profit was \$287.73 on revenues of \$225,717.32. In the 1960-61 fiscal year, the operating profit was \$8,919.96 on revenues of \$241,408.19, and in 1961-62, the operating profit fell to \$7,874.76, even though revenues increased to \$250,148.10. The company's fiscal year was changed in 1962 and for the period beginning March 1, 1962, and ending June 30, 1962, KGNS-TV showed a profit of \$6,890.84 on revenues of \$85,049.51. A big improvement was made in the fiscal year ending June 30, 1963, owing principally to a reduction in expenses. Even though revenues

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fell to \$232,414.70, the operation of KGNS-TV showed a profit of \$19,526.97. Complete figures for the current year are not available yet, but it appears that they will be quite similar to those for the year ending June, 1963.

33. There is obviously little "margin for error" between operating at a profit and at a loss — the figures quoted were operating figures and do not include depreciation or reflect any payments to stockholders. It appears unlikely that, for the foreseeable future, KGNS-TV will be able to obtain revenues in excess of the \$250,000 which it obtained in the fiscal year ending February of 1962. Since that time, revenues have fallen and have become relatively stable and, in fact, it does not appear that KGNS-TV will achieve the 1961-62 level in the near future.

34. It is alleged upon information and belief that KGNS-TV is obtaining roughly the maximum revenues from national and regional accounts possible. This assertion is based upon conversations with station representatives in Dallas, Texas, and in New York City, and also upon the comparatively high cost per thousand viewers to KGNS-TV advertisers.^{16/} Additional

^{16/} The highest one minute rate for KGNS-TV is \$50. Based on the ARB net weekly circulation figures, this results in a cost per thousand viewers of in excess of \$4.00. This is exceedingly high except for single-station markets. For two or more-station

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accounts might, of course, be obtained if rates were reduced but it is not believed that such action would result in a corresponding increase in revenues.

35. It is also believed that Southwestern has reached the point where there is no great likelihood of increasing, to a meaningful extent, the amount of revenues which it obtains from local Laredo advertisers. Earlier in this Petition, the basic economy of Laredo and the extent of other competitive communications outlets in the community were discussed. Both subjects have bearing on the matter of local revenues. Additionally, the retail economy of Laredo is, to a large extent, aimed at trade with Spanish speaking consumers.

36. The principal source of retail trade is mainly in the areas of soft goods, small appliances, cosmetics and related items, cameras,

and other items which can be carried easily by hand.^{17/} The great majority of the retail stores dealing in these items do not advertise through any of the local media,

^{16/} (continued) markets, many advertisers have a maximum cost per thousand viewers which may be paid — most often the figure is a little more than \$2.00.

^{17/} Evidence of this is found in the fact that Webb County is the only market in the United States where retail expenditures for wearing apparel exceed the retail expenditures for automobiles on a consistent basis.

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although KGNS-TV salesmen constantly call on them. What little advertising that is done by these concerns is usually placed on one of the Mexican facilities at a much lower rate.

37. Additionally, the level of retail sales in Laredo is simply not sufficient to result in a large amount of local advertising revenue especially for a television station which must, because of costs, employ rates somewhat higher than other media. By way of comparison, the retail sales of Webb County for 1962 totaled \$65,525,000. In 1960, Webb County had population of 64,791. For Tom Green County, which had 1960 population of 64,630, 1962 retail sales totaled \$87,414,000. Laredo itself, which had 1960 population of 60,678, had total retail sales in 1962 of \$64,428,000, while San Angelo had 1960 population of 58,815 and retail sales in 1962 of \$83,820,000.^{18/} It is believed that San Angelo is more representative of the "norm" than is Laredo.^{19/}

38. During a "typical" month, KGNS-TV will carry advertising for approximately fifty-four entirely local accounts.

^{18/} Additionally, San Angelo has approximately 100 more retail outlets than Laredo.

^{19/} The total retail sales figures, unlike the other economic indicators, do show some increase in Webb County and Laredo since 1959. This is attributable, however, to an inflationary price rise in commodities rather than to an increase in unit consumption. As an indication of this fact, reference is made to the household income figures contained elsewhere in this Petition.

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In December of 1963, KGNS-TV was able to obtain its "high" for the year — seventy-one local accounts. In July of 1963, the "low" was reached when only forty-one local accounts advertised on KGNS-TV. The Laredo Chamber of Commerce lists only 509 retail establishments of all types in Laredo; many use the facilities of KGNS-TV at one time or another throughout the year. Many concerns, of course, such as gasoline stations, do no local advertising because they receive the benefit of national spot exposure in the market. Most others simply have no budgets available for television advertising.

39. KGNS-TV has also found more and more advertisers using as an "excuse" either to drop, cut back, or not to accept advertising, the existence of the local community antenna system. This is based principally upon the comparatively high cost per thousand viewers for advertising in Laredo and the fact that the CATV system serves approximately one-fifth the number of homes which KGNS-TV does. It is reasonable to expect that this "trend" will become more meaningful in the event another television station further divides the viewing audience in Laredo. It is believed that a grant of the Channel 13 application would result in some loss of local advertising revenues to KGNS-TV even

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though K-Six does not propose to "sell time" in Laredo.^{20/}

40. Where the real "squeeze" would be experienced, however, in the event of a grant, is in the areas of national and regional advertising. There is very little, and at the present time no, advertising by national and regional accounts in Laredo which do not also advertise on Corpus Christi facilities. The addition of a third television station in the substantial community of Corpus Christi is not likely to result in a loss of its "must buy" character. If concerns which otherwise would advertise in Laredo are able to get their "messages" to the community without extra charge — by buying Corpus Christi (KZTV) — there is, of

course, little possibility of obtaining those accounts for KGNS-TV.^{21/}

^{20/} It must be kept in mind that although KGNS-TV is the only American television station serving Laredo, it is faced with vigorous competition by other media of advertising as well as from Mexican broadcast facilities.

^{21/} No discussion is given herein to the "leverage" which K-Six will have with respect to the other Corpus Christi facilities in the event of a grant of the application. It is submitted, however, that a substantial public interest question exists when a station serving a substantial community is permitted to expand its coverage outside its Grade B area through the use of "satellite" facilities. This is not the case of a small market television station in a sparsely populated area attempting to increase its coverage through the use of a "satellite." Apparently, K-Six is attempting to expand its coverage on a "grand scale" when it could not even accomplish the same thing, on a smaller scale, through translator facilities owing to the provisions of Section 74.732(e) of the Commission's Rules. Furthermore, there is ground for concern that the other Corpus Christi stations might seek to accomplish what K-Six hopes to by similar means in Laredo.

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41. Since the application was filed, personnel of Southwestern have been carefully reviewing the situation in Laredo, in an effort to determine with as much precision as possible the impact that a grant might have on the operation of KGNS-TV. To this end, numerous conferences have been held with Southwestern's station representatives and others to discuss particularly the problems which might be encountered with respect to national and regional advertising accounts.

42. Currently, KGNS-TV has advertising contracts totalling \$42,932.90, for national accounts which are "billed" by its representatives' offices outside the State of Texas. Of these accounts, only \$16,472.90 involve specific "buys" of KGNS-TV. As a result of its studies, Southwestern is of the supportable opinion that a large amount of the remaining \$26,460 would have gone to a Corpus Christi-Laredo combination such as that proposed by K-Six, owing principally to the lower cost per thousand viewers which would have been obtainable and the fact that all of the accounts presently advertise in Corpus Christi.

43. Additionally, Southwestern presently has outstanding \$25,631.54 in advertising contracts billed by representatives outside Laredo but within the State of Texas. These are, of course, principally regional accounts which all advertise in

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Corpus Christi. It is recognized that being "closer to home" more "personal contact" is established than is the case with New York accounts and, accordingly, a certain amount of business of this nature can be retained. "Good will" goes only so far, however, and the advertising agency must look to its client's best interest which is, generally, based upon cost per thousand viewers.

44. It is obvious, therefore, that a grant of the application would not only result in the destruction of Southwestern's ability to operate at a profit but would result in substantial financial losses to KGNS-TV. It must be realized that this discussion pertained to existing advertising accounts only and was not concerned with revenues which Southwestern might hope to obtain from other advertising accounts throughout the year.

45. Perhaps, Southwestern is viewing the situation with too much pessimism. It hopes so! Southwestern realizes, though, and so does the Commission, that agencies "buy by the book."^{22/} If a Corpus Christi-Laredo combination can be purchased at a lower cost per thousand viewers than an "independent"

^{22/} The Commission's awareness in this respect is reflected in its concern over the use of broadcast rating surveys and similar data by broadcasters and their representatives.

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Corpus Christi station and KGNS-TV can be purchased, advertisers will do so. It will take little lost business to turn KGNS-TV from a profit-making to a losing operation in Laredo.

Network Question

46. In its application K-Six indicates that it will rebroadcast on Channel 13 the signal of KZTV, Corpus Christi. The Commission is familiar with the provisions of network affiliation agreements. If K-Six is correct in this respect, it may be expected that KGNS-TV will lose the benefit of its valuable affiliation with the CBS Television Network. In many cases, it is believed, but it is by no means certain, programming available from both NBC and ABC may be used to fill the resultant "gaps" in the schedule.^{23/} It is not alleged that the loss of the CBS network affiliation agreement will result in a loss of network compensation — the CBS rate to KGNS-TV is presently lower than that of the other two networks.

47. Important, however, is the fact that Southwestern has relied to a great extent upon CBS programming in the past because of its popularity in the Laredo market and the loss of

^{23/} At the present time, KGNS-TV is carrying 22-3/4 hours weekly of CBS programming. Southwestern would hope to secure clearances from NBC and ABC to replace all but 1-3/4 hours of its present CBS programming.

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viewers it would otherwise have experienced to the local CATV system. A loss of any affiliation agreement and the consequent "overhaul" of the schedule of KGNS-TV would obviously result in the loss of a substantial amount of "good will" and viewers. No doubt this would be reflected in, at least, the local revenues obtained by the station.

The Operation of KGNS-TV

48. It has been established beyond question that in the event of a grant Southwestern will experience substantial losses in revenue and that it will no longer be able to operate at even a modest profit as it has done in the past. It is realized that this fact alone has no legal significance. Whether a station makes a \$100,000 profit or suffers a \$100,000

loss is not a matter of legal concern either to the Commission or to the courts. If, however, a station incurring substantial losses is unable to operate in the public interest, or if it must curtail its public service programming by virtue of a grant of a competitive facility, the Commission must be concerned and must make a determination of where the public interest lies, FCC v. Sanders Brothers Radio Station, supra; Carroll Broadcasting v. FCC, supra.

49. There can be doubt that a grant of the subject application would result in serious financial injury to KGNS-TV. The

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station has operated at a small profit for the past few years and a grant would cause the station to operate at substantial losses. There are two courses of action, and a combination of both, which might be pursued by Southwestern in an effort to remedy the situation:

a. Southwestern could embark upon a vigorous sales campaign to offset the lost revenues. This is not, however, considered possible from a practical standpoint since KGNS-TV has, to a large extent, operated at maximum revenue capacity. Although additional accounts might possibly be obtained by a lowering of rates, this would not increase actual revenues.

b. It can cut expenditures to offset the losses. In view of the magnitude of the expected losses, it is not believed that this, either, offers a practical solution to the problem. More significantly, there is simply "no room" for a reduction in expenses if KGNS-TV is to continue to provide needed service to the public.

50. At the present time, KGNS-TV is staffed by fifteen fulltime employees. In the interest of economy, many of these

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employees serve in more than one capacity. As examples, one of the copy writers also does some actual work on the air; some of the engineers do occasional announcing and "floor" work; the film editor also

does camera work; and one of the salesmen does the station's art and photographic work. KGNS-TV also employs full time one person as promotion manager who devotes most of her time to the public service aspects of the station's operations. Additionally, three announcers from the affiliated radio station in Laredo do some television "air" work.

51. In view of the varied duties of KGNS-TV staff members, the pay scales are perhaps somewhat higher than the average in Laredo. This has proved necessary in the interest of keeping competent personnel equipped to handle a variety of positions. Of the fifteen fulltime employees, three have been with the station for more than eight years and four others for at least five years.

52. It is submitted that the staff is of a minimum size to enable KGNS-TV to provide to its public a valuable programming service. It is difficult to envision any further reduction in number or quality (and consequently, in salaries) of the employees. And, in addition to regular station duties, as a part of their employment at KGNS-TV staff members are expected to, and do, engage actively in community affairs and staff selections are based in part upon this consideration.

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53. Even with this small staff and operating under difficult market conditions, Southwestern has been able to provide its viewers with a substantial amount of local live and public service programming.

54. Southwestern actively solicits public service programming and receives numerous demands for public service time which it gladly grants. Also, one entire broadcast day every year is donated to the March of Dimes for purposes of presenting a "telethon." Not only does KGNS-TV donate the time for this project, but it also absorbs all production costs. All county and city officials are acquainted with the fact that any requests for time will result in "prime time" being made available for discussion of matters of concern to Webb County or the community of Laredo. KGNS-TV does not hesitate to preempt network programming for this purpose.

55. KGNS-TV broadcasts a substantial amount, when consideration is given to the nature of its operation and the Laredo market, of live programming on a regular basis. The station's "performance" as reflected in the "composite week" analysis submitted with its renewal application on May 2, 1962, indicated a total of 7.52 percent live programming. In the hours between 6:00 and 11:00 p.m., it had a total of 10.4 percent local

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live programming. At the present time, live newscasts are carried every weekday at 7:25 a.m., 8:25 a.m., 12:00 noon — a live market report follows at 12:10 p.m. — 6:00 p.m., and 10:00 p.m. Additionally, the following locally-produced live programs are currently being carried on a regular basis:

- a. A program devoted to a discussion of all aspects of social security.
- b. A program produced, written, and directed by the radio-television class of Martin High School in Laredo called "The Performing Arts." Students engage in all functions necessary to the program's presentation under the supervision of KGNS-TV personnel.
- c. A program termed "The Christian Union Institute" presented by a small non-denominational school from Zapata, Texas. The program features students' presentations.
- d. A discussion program produced in cooperation with the Texas Department of Public Safety on which a representative of the Office of Public Safety answers telephone inquiries on questions consistent with the basic format of the program.

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- e. A program produced in association with the Civil Air Patrol with particular reference to the role which the CAP plays in Laredo and the immediate area.

f. A program produced in cooperation with the Laredo Ministerial Alliance. Discussions on the program are usually devoted to Christian ethics or the subject of modern-day morality.

g. A Spanish language religious program produced in cooperation with La Iglesia Divinio Salvador, in Nuevo Laredo, Mexico. The title of the program is "Refrigeria Espiritual" or "Spiritual Reflections."

h. A program called "Life in the Sea" which is, in addition to "The Performing Arts," produced in association with the Martin High School radio-television class. The current series is based upon the book The Sea Around Us. This is a panel-discussion type program and numerous exhibits are used.

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i. A home show presented with the cooperation of the home service agent of the Central Power and Light Company on which discussions are held of particular interest to women.

A number of "public service" type network and film shows are also carried on KGNS-TV on a sustaining basis.

56. KGNS-TV's operating expenditures run approximately \$625 per day, a substantial portion of which is allocable directly to programming. Costs incurred in connection with programming are significantly higher for live presentations than when reliance is placed upon network or filmed programming. The vast majority of KGNS-TV's local live, and public service, programming is sustaining, or non-revenue producing. It is obvious that if expenditures must be reduced to offset lost revenues, the logical place to begin "cutting" is in the non-revenue producing aspects of the station's operation. Southwestern is well aware of the importance of its local live and public service programming to the community which it serves. It would be with only great reluctance that Southwestern would "cut back" to any extent its efforts in this area. If the Channel 13 application were granted, however, Southwestern would have little

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choice if it wished to preserve, at all, the programming service which it provides to the community of Laredo.

57. This is not a "threat"; it is a basic "fact of life." We have in this country a commercial broadcasting system. Licensees of commercial facilities must, of course, realize some return on the capital investments and significant operating expenditures which are made. The Commission itself has recognized the importance to good public service programming of profit-making operations and has expressed concern for the plight of "losing" facilities.^{24/}

58. It is clear that a grant of the instant application would effectively curtail the ability of Southwestern to provide, to a significant extent, a programming service in which local live and public service productions play an important role. It would be forced to rely upon revenue-producing and/or costs-savings programming in order to offset the loss which inevitably would be incurred.

59. It certainly cannot be alleged seriously that the proposed Channel 13 operation would "take up" the resultant "slack"

^{24/} See, for example, the Commission's Notice of Proposed Rule Making in Docket No. 15084, released May 17, 1963.

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in public service programming. K-Six obviously realizes the limitations of the Laredo market and has made operating plans accordingly. It proposes only a "satellite" operation. What little local live programming that it does propose to produce is scheduled during the earliest periods of its daily proposed operating schedule. The remainder of its programming would be devoted entirely to rebroadcasting the signal of its facility in Corpus Christi.

60. It is realized that Channel 13 would provide a second source of American free television to the public in Laredo.^{25/} Indeed, the third priority is to provide a choice of at least two television services to all

parts of the United States. But, the second priority is to provide each community with at least one local television station. A grant of the K-Six application would effectively preclude, for the foreseeable future, high-quality local programming for the community of Laredo.

61. In view of the fact that a grant would destroy, to a great extent, Laredo's local programming and the fact that only a "satellite" operation is proposed, and in addition a serious

^{25/} Channel 11 in Nuevo Laredo also provides a service to Laredo. This is significant in view of the fact that the community has a substantial number of Spanish speaking residents.

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"Carroll" issue is raised, the Commission should inquire whether a grant of K-Six's application would result in a fair, efficient, and equitable distribution of television facilities within the meaning of Section 307(b) of the Communications Act of 1934, as amended.

B. The Programming Question

62. When the Commission established its current system of television allocations, it viewed as of utmost importance the provision of local television services. Priority was given only to the provision of a first free television service. It goes without saying that the Commission, in licensing facilities to a particular community, is most concerned with how the licensee proposes to serve its designated community.

63. K-Six proposes only a "satellite-type" operation. It is obviously motivated by a desire to protect its competitive position in Corpus Christi when a third VHF television station begins operations in that community.

64. It does not appear that K-Six has done anything to determine the need for the type of facility which it proposes or to "gear" its programming particularly to the community. It has obviously assumed, without benefit of supporting data, that the programming of Corpus Christi, a community entirely

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distinct from Laredo, is also suited to Laredo. No indication is even given as to how it determined a need for, or arrived at, the format for the insignificant amount of local live programming which it proposes. In fact, no description is even given of the live programs themselves. In short, it has failed to meet the responsibilities which the public interest and the Commission demand of a potential licensee as reflected in the Commission's programming report of 1960.^{26/}

* * * * *

^{26/} Report and Statement of Policy on Programming, 20 Pike & Fischer, 1962; see also In Re Suburban Broadcasters, 20 Pike & Fischer RR 951; and Suburban Broadcasters v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191.

* * * * *

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* * * * *

III. CONCLUSION

71. For reasons stated in this Petition, we respectfully urge the Commission to deny the subject application of K-Six and, to that end, to designate the application for hearing on issues including the following:

a. To determine if a grant of the subject application would result in such financial losses to the existing local television operation in Laredo that the public interest would be injured.

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b. To determine whether the proposed operation would provide a fair, efficient, and equitable distribution of television facilities.

c. To determine what, if anything, K-Six has done to determine the programming needs, tastes, and interests of the area which it proposes to serve and how it has formulated its programming schedule to meet those needs.

d. To determine whether the estimated operating expenses of K-Six are reasonable and to determine whether K-Six is financially qualified to construct and operate the proposed facility.

e. To determine, in view of the foregoing issues, whether the public interest, convenience, or necessity would be served by a grant of the pending application.

Respectfully submitted,
SOUTHWESTERN OPERATING
COMPANY

By Haley, Bader & Potts

/s/ Andrew G. Haley

/s/ David H. Lloyd

Its Attorneys

1735 DeSales St., N.W.
Washington, D.C. 20036
March 24, 1964

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AFFIDAVIT

County of Sebastian)
) ss.
State of Arkansas)

Roy J. Bowman, being first duly sworn, deposes and says that he is a Vice President of Southwestern Operating Company and General Manager of Station KGNS-TV, Laredo, Texas, and that he has read the foregoing "Petition to Deny", that he has personal knowledge of the facts in said Petition and that said facts are true and correct to the best of his knowledge and belief, except in the cases of references to sources of information contained in the Commission's files and in cases involving allegations of fact of which official notice may be taken.

/s/ Roy J. Bowman

[JURAT the 25th day of March, 1964.]

[Rec'd-FCC-May 21, 1964]

EXCERPTS FROM
OPPOSITION TO PETITION TO DENY

K-SIX Television, Inc. ("KSIX"), applicant for a new television broadcast station to operate on Channel 13 at Laredo, Texas, herewith opposes the Southwestern Operating Company ("Southwestern") Petition to Deny filed in the above-captioned matter. In support whereof the following is shown:

The Basic Facts

1. On February 17, 1964, KSIX filed its application to construct a second U. S. television station at Laredo, Texas, proposing to operate on Channel 13 which has been allocated to Laredo, but lain fallow there, since 1952. KSIX, which is also the licensee of Station KZTV, Corpus Christi, Texas proposes to broadcast 110 hours weekly — including nearly seven hours local, live programming and network and recorded programs rebroadcast from Station KZTV. This station, operating with ERP of 21.9 kw and antenna at 419 feet, would not only bring a second U. S.

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service to the Laredo market, but because its service area would be substantially greater than Laredo's present television station (KGNS-TV) it would bring both better quality service to Laredo and a first U. S. television service to an area in Webb (Laredo) and Zapata Counties in excess of 1800 square miles.^{1/}

2. Southwestern, licensee of Station KGNS-TV, Laredo, Texas, has petitioned to deny KSIX's application on grounds hereinafter discussed. Donald W. Reynolds, owner of Southwestern, has a controlling interest in the following broadcast stations:

VHF Television

KGNS-TV - Laredo, Texas
 KORK-TV - Las Vegas, Nevada
 KOLO-TV - Reno, Nevada
 KFSA-TV - Fort Smith, Arkansas
 KFOY-TV - Hot Springs, Arkansas

AM Radio

KGNS - Laredo, Texas
 KFSA - Fort Smith, Arkansas
 KBRS - Springdale, Arkansas
 KOLO - Reno, Nevada
 KORK - Las Vegas, Nevada
 KOKL - Okmulgee, Oklahoma

FM Radio

KORK-FM - Las Vegas, Nevada

^{1/} See Appendix A attached hereto (engineering statement). This "white area" had a 1960 population of 2,776 persons, Supra.

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Mr. Reynolds, in addition to his assorted broadcast interests, has extensive interests in newspapers and other media throughout Nevada, Arkansas, Oklahoma and Texas, and in Alaska and Hawaii.^{1/}

3. Southwestern's objections to the KSIX application fall into four essential categories, as follows:

- a. It urges that a grant to KSIX would result in such financial loss to KGNS-TV that the public interest would be adversely affected, thus raising a Carroll issue;
- b. It urges that the application raises a question of "fair, efficient, and equitable allocation and assignment" of Channel 13;

^{1/} Among the other media which Mr. Reynolds lists on his calling card are: Juneau, Alaska, The Daily Alaska Empire (Evening & Sunday); Fort Smith, Arkansas, Southwest-Times Record (Morning, Evening & Sunday); Donrey Outdoor Advertising Co.; Rogers, Arkansas, Rogers Daily News (Evening & Sunday); Hawaii, Hawaii, Hawaii Tribune-Herald; Carson City, Nevada, Nevada Appeal (Evening); Elko, Nevada, Donrey Outdoor

^{1/} [cont'd] Advertising Co.; Ely, Nevada, The Daily Times (Evening); Las Vegas, Nevada, Donrey Outdoor Advertising Co., Las Vegas Review-Journal (Morning, Evening, Sunday); Reno, Nevada, Donrey Outdoor Advertising Co., Nevada Network; Bartlesville, Oklahoma, Examiner-Enterprise (Morning, Evening, Sunday); Blackwell, Oklahoma, Journal Tribune (Evening & Sunday); Chickasha, Oklahoma, Daily Express (Evening & Sunday); Guthrie, Oklahoma, Daily Leader (Evening & Sunday); Okmulgee, Oklahoma, Daily Times (Morning & Sunday); Levelland, Texas, The Daily Sun News.

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- c. It urges that KSIX's application does not indicate the steps taken to ascertain community program needs, or how the proposed service would meet those needs;
 - d. It raises a question of KSIX's financial qualifications.
4. Because a number of Southwestern's allegations relate, in one way or another, to KSIX's proposed mode of operation and its purposes in seeking to bring a second U. S. television service to Laredo, the facts in this regard will be set forth at the outset. KSIX proposes to program its Laredo station by offering substantial local, live programming and by rebroadcasting principally network and recorded programs of Station KZTV. By this means it proposes to offer, at the outset, a program service covering 110 hours per week. It was KSIX's considered judgment that this proposal was not for a satellite operation since there would be nearly seven hours live programming for Laredo (an amount which coincidentally is virtually the same as Southwestern's Station KGNS-TV rendered for the composite week shown on its most recent renewal). Rebroadcasting Station KZTV was considered the most practical way to offer extensive non-local programming.
5. In choosing this means to program a Channel 13 station at Laredo, KSIX recognized that the Laredo market

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would not support a second station with its extensive proposed programming if that station had to utilize expensive cable interconnection to receive network programs. In so doing it followed the example of Station KGNS-TV that rebroadcasting the network programs of other stations, rather than relying upon cable interconnection to receive those programs, was the most practical mode of operation.^{1/} By its statement that the market cannot support two stations (App., Ex. 7) this was all KSIX intended.

6. Similarly, in proposing no revenues from the operation of the Channel 13 station during the first year, KSIX was demonstrating its financial qualifications to operate without revenues at the outset and its readiness to offer the proposed service in the absence of revenues. By so doing it was not saying that it would not "sell time." Although the station will be

^{1/} As the Commission's records indicate Station KGNS-TV rebroadcasts the signals of San Antonio stations for its network offerings, which comprise nearly 90 hours of its weekly schedule.

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put on the air before a sales staff is established and will be operated for the first year without reliance on advertising revenues, KSIX does intend, when its operation is established, to sell advertising in Laredo and otherwise to operate the Channel 13 station as a fully competitive business. KSIX intends, however, to ease into the Laredo market — not to crash into it.

7. Thus, KSIX contemplates a substantial investment in the future of Laredo, by constructing a new station with full studio and equipment for local operation. It proposes at the outset very substantial programming, and without reliance on advertising revenues from that market. It is able to do this because of the economies made possible by rebroadcasting substantial portions of Station KZTV program service. In this

connection, it has approached the Laredo market cautiously because it recognizes that this market, like most television markets, requires an initial period of time to adjust and adapt to the presence and availability of an additional service.

The Carroll Issue

8. Southwestern contends that the Laredo television market will not support a second station, and that advent of a Channel 13 operation there would injure Station KGNS-TV

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such that the public interest would suffer from an overall loss or deterioration of service. Thus, its contention involves both whether the market will "support" an additional service and, if not, whether there would result an overall deterioration in service, quantitatively or qualitatively, as a result of the grant — taking into account the service rendered by all stations including the new one. In Missouri-Illinois Broadcasting Company, 1 RR 2d 1 (1963), the Commission recently had occasion to articulate the pleading standard necessary to raise the Carroll issue. There it said:

"We . . . require that a petitioner allege facts which are sufficiently related to the economics of broadcasting, including the specific relationships between any assumed losses in revenues to the withdrawal of particular programs or program services, to raise a substantial question as to the ability of the area involved to support another broadcast station without loss or degradation of service to the public. Although we recognize that it may be more difficult to plead specific facts in support of an economic issue than it is with respect to other issues, we cannot accept a recitation in extremely general and speculative terms. For, inability to make persuasive allegations is indicative of a probable failure of proof at a subsequent hearing, and we do not wish to

delay a grant otherwise fully in the public interest without good cause . . ." (Emphasis added).^{1/}

^{1/} See also Tree Broadcasting Company, 1 RR 2d 15 (1963); KAKE-TV and Radio, Inc., FCC 64-412, released May 11, 1964; RR 2d (1964). Missouri-Illinois is now the leading case interpreting the pleading standard to raise the Carroll issue.

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Thus, Southwestern's contentions must be tested against this standard, and, as will be shown, when so tested it is clear that a Carroll issue has not been raised.

9. Southwestern's allegations in support of a Carroll issue fall into the following categories, covering more pages than substance:

a. The Laredo Economy. These allegations consist of population and television homes data, Laredo retail sales figures, family income data, and the Laredo unemployment rate. The material suggests generally that the Laredo market has not been the picture of economic health, although the most recent figures indicate a current uptrend (Petition, paras. 17-21).

b. Competing Media. Southwestern goes to some lengths to show that there are various competing media in the Laredo market, both domestic and foreign and including CATV. The thrust of the allegations is that Station KGNS-TV presently has substantial competition, even though it is the only U. S. television station in the market. (Petition, paras. 22-31).

c. KGNS-TV's Financial Position. Southwestern presents a picture of Station KGNS-TV as a marginal operation, moving from losses to small profits over the years. It contends that Station KGNS-TV is presently deriving all of the revenue potential from the market. (Petition, paras. 32-39).

d. Effect Upon Station KGNS-TV. The allegations here are that advent of a second station would result in loss to Station KGNS-TV of national and regional spot business as well as CBS

programs. It argues that any such decline in revenues would necessarily result in a decline in program service — particularly local, live programming. Finally it urges that the public would be worse off if its station were forced to cut back on live programming. (Petition, paras. 40-61).

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10. With respect to "the Laredo economy" allegations, at the outset it is noted that they are highly selective. Regardless of the impression which the cited statistics tend to create, they provide insufficient basis for conclusions about the real state of Laredo's economy as it relates to support for additional television service. Just as the Commission noted in Missouri-Illinois, there are no specific allegations concerning business potential in the market and, most significantly, no specific allegation as to what advertising revenues, existing or potential, are available to the market. Actually, the statistics cited create quite a false impression, as is more fully discussed in paragraphs 32-37, *infra*.

11. Further, it is noted that to suggest a downward trend Southwestern relies significantly on population estimates by Sales Management. The process by which Sales Management arrives at estimated population figures for any year, however, raises questions as to the reliability of Southwestern's analysis. Sales Management in effect builds upon the last official census — for the 1959 figures its base was the 1950 census. If it over-estimates one year it adjusts on the basis of the next official census. In short, reliance on Sales Management is

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questionable for comparison of a late decade year with an early (next) decade year, particularly if the decennial year turns out to have involved an overestimate. Here Sales Management overestimated Laredo's 1960 population, thus suggesting it had overestimated the 1959 figures; its 1963 figures were predicated upon the official 1960 census data. Thus,

in comparing 1959 to 1963 the overestimate probable for 1959 does much to undermine the thesis that there was a 1959-1963 downtrend.

12. Concerning "competing media" in the Laredo market, the fact that other media are present in the market has no real bearing upon the capacity of the market to support one more television station. It is noted, however, that in citing other media Southwestern mentions all Nuevo Laredo (Mexico) media while in giving economic data for the local economy it ignores the population and revenues which the Mexican audience provides its station. Similarly it cites a "guesstimate" of the flow of advertising dollars from Laredo to Mexican media (Petition, para. 27), while conveniently ignoring the reverse flow to U. S. media. The allegations, generally unsupported and corroborative at most, fall short of the standard required to raise the Carroll issue.

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13. In discussing other media in the market, Southwestern cites existing CATV service and claims injury therefrom while totally failing to address itself to the effect upon CATV competition from advent of a second U. S. service in the market. This convenient oversight should not be minimized — even by Southwestern. The Commission's own experience confirms that CATV competition is most effective where there is a paucity of free service; in most instances the success of wired television has gone hand-in-hand with the failure of free television to provide a choice of services. In short, the communities where CATV has flourished have been characterized by an absence of real choice in television services. If Southwestern chooses to rely upon CATV service as a source of competition to it for purposes of opposing a second free U. S. television service in the market, it was incumbent upon it to plead to the effect upon CATV operations of advent of the service. The implication, in the absence of allegations of fact to the contrary, is that CATV operators will be hurt and free television (including Southwestern's station) will be helped.

14. With respect to Southwestern's allegations pertaining to "Station KGNS-TV's financial position," the allegations are strikingly conclusory in nature. Thus

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it claims "losses" or small profits without yielding underlying financial data. Similarly, Southwestern cites total figures to the exclusion of the component data which would permit meaningful evaluation of its position. Southwestern's burden was to bare its financial soul, in effect; this it has not done. Such evasion of the standard of specificity contemplated by the Missouri-Illinois case is not compatible with invoking hearing rights under the Carroll issue.

15. Another area in which insufficient allegations have been made pertains to the fact that Southwestern owns both Station KGNS-TV and Station KGNS(AM) in Laredo. According to the most recent renewal applications for each, they utilize certain common staff; also, they share common quarters.^{1/} Southwestern conveniently overlooks explaining the accounting procedures whereby staff and other costs, including housing, for TV and AM are allocated to one or the other. Where, as here, its whole petition is bottomed upon drawing fine distinctions as to station income, the matter of such methodology is highly pertinent. The required standard of pleading specificity cannot be satisfied by Southwestern blandly asserting conclusions.

^{1/} See BRCT-503 and BR-4031 (1962).

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16. But if Southwestern's Petition is characterized by reliance on conclusory allegations in the foregoing areas, even they pale by comparison with the allegations, "upon information and belief," that Station KGNS-TV is presently drawing from the market all potential revenues (Petition, para. 34). Southwestern's whole asserted basis is "conversations with station representatives in Dallas, Texas, and New York City."

Apart from the gross hearsay character of this assertion (Southwestern was free to obtain its "rep's" affidavit), the fact that a "rep" might have stated this to a station is surely entitled to little weight — at least in the absence of far more detail. For example, if such were a "rep's" view, the Commission is entitled to know why. Is the reason that spot rates are too high, (see para. 41, infra) is it that KGNS-TV has inferior facilities which could be improved, (see para. 39, infra) is it that the station is mismanaged? Such questions illustrate the reason there is a burden to plead facts as distinguished from conclusions.

17. With respect to the "effect" which grant of the subject application would have "upon Station KGNS-TV" (Petition, paras. 40 et seq.), Southwestern quotes its current billings and then jumps to the conclusion that

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advent of a new service would cause it to lose certain accounts. To substantiate this it cites its own "supportable opinion" (Petition, para. 42). Southwestern's only real basis for concluding that it would be injured is its analysis that advertisers select markets on a cost-per-thousand basis, and that the cheaper way into Laredo for an advertiser would be through Station KZTV as rebroadcast by KSIX's proposed Laredo station. Appendix B attached hereto is an excerpt from a recent issue of Sponsor Magazine, the impact of which is that CPM is not determinative in the selection of markets in anything like the degree Southwestern urges. Moreover, the assumption that an advertiser would buy Corpus Christi merely to get a lower CPM in Laredo, notwithstanding the much greater total expense, is patently absurd.

18. In connection with the economic impact forecast by Southwestern, assertions are made concerning the availability of local business. In substance Southwestern acknowledges that there is no basis to conclude that grant of KSIX's application would adversely affect in significant degree its present local business. The thrust of its argument is that the anticipated decline in national and regional business could not be

offset by an increase in local business (Petition, paras. 35-39). Essentially its

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reason is that more advertisers will not pay the comparatively high price for spots on Station KGNS-TV. Here again Southwestern's pleading falls short, for while it speculates about embarking upon a "vigorous sales campaign" (Petition, para. 49a), it nowhere analyzes what effect a reduction in spot rates would have on total revenues. To be sure it makes the bald assertion that a rate reduction would not increase revenues (Petition, para. 49a), but it nowhere pleads facts to support this highly questionable thesis. In fact, the facts pleaded, pertaining to the kind of advertisers available in the market, suggest quite the contrary (see para. 40, infra).

19. Concerning the effect upon Southwestern of grant of this application, curiously enough one of the principal contentions is that Station KGNS-TV will have to be programmed from only two networks since CBS programs would be carried on KSIX's station. Station KGNS-TV now programs 89 hours and 30 minutes of network programming weekly;^{1/} of this, only 24 hours and 30 minutes, or 27.2%, is devoted to CBS programming.^{2/} Quite evidently, the other two networks are more important to Station KGNS-TV than CBS,

^{1/} Based upon newspaper schedule for four weeks ending April 29, 1964.

^{2/} Station KGNS-TV does not carry 7 of the top 25 ARB-rated (February 1964) CBS programs: "Candid Camera", "Jackie Gleason", "Red Skelton", "The Lucy Show", "I've Got A Secret", "Danny Thomas" and "To Tell The Truth."

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and since CBS programs some 70-1/4 hours of sponsored programs weekly, Station KGNS-TV is presently not carrying 65% of the allegedly more popular CBS programs. More significantly, since the NBC and ABC hourly rates for Station KGNS-TV are double that of CBS (\$100 for the former two, \$50 for CBS) actually Station KGNS-TV stands to realize

a decided increase in revenue from devoting the present CBS hours to other networks offerings.

20. Southwestern disingenuously seeks to avoid the fact that from a revenue standpoint it will be better off by the bald assertion:

"A loss of any affiliation agreement and the consequent 'overhaul' of the schedule of KGNS-TV would obviously result in the loss of a substantial amount of 'good will' and viewers. No doubt this would be reflected in, at least, the local revenues obtained by the station." (Petition, para. 47)

Once again speculation and conclusion are simply no substitute for hard facts.

21. Southwestern (Petition, paras. 8-47) attempts to demonstrate, however inadequately, that advent of a new station in Laredo would result in financial loss to Station KGNS-TV. It next (Petition, paras. 48-61) seeks to show how Station KGNS-TV's service would be impaired by such losses. In this latter connection its allegations fluctuate between speculation and sheer conclusion. For

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example, the petition speculates as to how Southwestern might meet such a problem (para. 49), it speculates as to how "difficult" it would be "to envision" a reduction in staff (para. 52), and it speculates as to the programs now broadcast which might be affected (paras. 55, 57-59).

22. What isn't speculation is sheer conclusion, e.g.:

"A grant of the K-Six application would effectively preclude, for the foreseeable future, high-quality local programming for the community of Laredo." (Petition, para. 60; emphasis Southwestern's).

Southwestern's petition totally fails to allege facts to show that grant of KSIX's application would lead to a decline in Southwestern's present service to the public.

23. In Missouri-Illinois, supra, the Commission made clear that far more than allegations with respect to the prospective effect on revenues

from advent of a new service was required to raise a Carroll issue. There it pointed out that even assuming that sufficient allegations had been made as to the inability of the market to support additional service, petitioner's burden included showing specifically what effect grant would have on its service to the public and total service to the public. There the Commission found the petition wanting because it had merely alleged that loss of revenue would result in

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cutback or curtailment of public service programming; it had not alleged specific facts as to the cost of such programming, savings which would be realized from cutback or curtailment, etc. Moreover, there had been no showing that the total service to the public, the existing service plus the proposed new service, would in total, quantitatively or qualitatively, be less.

24. Southwestern's petition is subject to the same infirmities. It has recited what its public service programs are (para. 55), but it has said nothing as to the cost of producing these specific programs.^{1/} It has made no showing, other than bare conclusory statements, that a reduction in revenues to it will require curtailment of these programs. It has made no factual showing that non-local programs are less costly than local programs. In short it has totally failed to demonstrate, by allegations of fact, that loss of revenues to it, even if foreseeable, would deprive the public of service now rendered by Station KGNS-TV.

25. Similarly, with respect to the effect upon the public, Southwestern totally fails to show that the over-

^{1/} The only cost figures given are para. 56, where Southwestern states that its operating costs are \$625 per day, "a substantial portion of which is allocable directly to programming."

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all service which would be rendered (its own plus the Channel 13 station's) would be less, quantitatively or qualitatively. It seeks to dismiss

the significance, in terms of service to the public, of the proposed Channel 13 station by characterizing it as a "satellite." But, as pointed out above, KSIX does not propose a satellite (see para. 4, supra and para. 48, infra). It proposes virtually as much local, live programming as Station KGNS-TV showed for the composite week of its latest renewal.^{1/} In short there have been no facts alleged to show that even if the impact of a new Channel 13 station were to force Station KGNS-TV off the air, service to the public would be less than if Southwestern succeeds in keeping a second U. S. station out of the market.

26. Commissioner Loevinger, in his concurring statement in Missouri-Illinois, said:

"The general rule for which this case stands is that an objecting competitor seeking to prevent a new grant to an applicant and to raise the issue that additional competition will be contrary to the public interest under

^{1/} It is significant to note that a substantial amount of the Station KGNS-TV "live" programming is news. While news programming is properly classified as live when wire copy is rewritten, this kind of programming is not expensive. See KAKE-TV and Radio, Inc., FCC 64-412, released May 11, 1964, RR 2d (1964). Moreover, it is highly commercial. See Appendix I attached hereto.

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the rule of the Carroll case must assert facts, as distinguished from conclusions, that are sufficient on their face to support the heavy burden of proof that rests upon any proponent of such an issue."

The burden of pleading is thus on petitioner and KSIX submits that in this case Southwestern has not met the burden of asserting facts which "on their face" make out a Carroll issue.

Laredo's Television Potential

27. Under the rule of Missouri-Illinois it would appear unnecessary for KSIX to rebut the unsupported conclusions of Southwestern's

petition. However, KSIX does not wish to leave any doubt that Southwestern's failure to meet its burden was for reasons unrelated to the merits, and it will therefore show in succeeding paragraphs that the Laredo television market can support a second station, that there is a need for an additional service in Laredo, and that the public will substantially benefit from grant to KSIX of a Channel 13 authorization.

28. In its Sixth Report and Order^{1/} the Commission allocated to Laredo two VHF frequencies: Channels 8 and 13. By so doing it made the allocations judgment that the purposes of Section 307(b) of the Communications Act would be served by the assignment. Channel 13 has been

^{1/} 1 RR 91:601 (1952).

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unused since that time while Channel 8 has enjoyed a complete monopoly since its operation commenced in 1956. This allocations history is important because the concept of a table of allocations is that once a channel is assigned to a community it is available for active service there.^{1/} Channel allocations are made by rulemaking in which interested parties may participate; questions pertaining to a market's capacity to support stations are appropriate matters for comment in such proceedings. One advantage rulemaking offers over adjudication for deciding such questions is that the temptation to oppose specific grants for the sake of hearing delay is thereby avoided.

29. The assignment of Channel 13 to Laredo was, so far as KSIX is aware, not specifically opposed; certainly Southwestern did not oppose it. Of greater significance there has never been, so far as KSIX is aware, a proposal to delete Channel 13 from Laredo on the ground that the Laredo market would not support two VHF stations. Southwestern has been operating in the Laredo market since 1958 (when it acquired the station from the original

^{1/} Cf. *Coastal Bend Television Company v. FCC*, 234 F.2d 686 (D.C. Cir. 1956); *Gerico Investment v. FCC*, 255 F.2d 893 (D.C. Cir. 1958).

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owners); it has kept its peace during all this time, notwithstanding the fact that rulemaking is the more appropriate procedure for raising its contentions. Thus, Southwestern entered the Laredo market with full knowledge that Channel 13 was also allocated there and it has never sought to have that frequency removed.

30. The Commission had the subject of South Texas allocations under detailed consideration in the Corpus Christi rulemaking proceeding, Docket No. 13194. Its concern was to find a third VHF allocation for Corpus Christi, and one of the proposals which was the subject of consideration was reassignment of Channel 13 from Laredo to Corpus Christi. Southwestern was the licensee of Station KGNS-TV at the time of this proceeding, and represented by communications counsel at that time. Southwestern failed to comment or participate in any manner in this proceeding even though, had it truly believed that the public interest demanded Channel 13 remain dormant in Laredo for the indefinite future, such view would surely have facilitated the Commission's resolution of the Corpus Christi problem. In short, Southwestern has seen fit to hold its peace in spite of clear opportunities to raise its voice. Its readiness to file a petition to deny the first proposal to light up Channel 13,

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claiming hearing rights with their attendant prospect for delay, raises a serious question whether Southwestern's Carroll position is in good faith or merely for the sake of delay.

31. The Corpus Christi rulemaking, in which Southwestern did not participate, attracted the attention of community and business leaders in Laredo. The Commission's Memorandum Opinion and Order and Notice of Proposed Rulemaking in Docket No. 13194, in reviewing filings there before it, noted:

"The Commission has also received telegrams from the Mayor

and President of the Chamber of Commerce of Laredo, opposing the deletion of Channel 13 from that city."^{1/}

Moreover, the Commission apparently gave some weight to the views of the Laredo Mayor and Chamber of Commerce President because it specifically concluded:

"As to deletion of the channel at Laredo, we do not believe that, where another alternative is available, we should consider the deletion of that city's second VHF assignment, which would in all probability leave the area for the indefinite future with only one United States television station."^{2/}

Thus, less than five years ago the Commission reaffirmed its 1952 judgment that Laredo should have more than one

^{1/} 18 RR 1793, 1794 (n. 2) (1959).

^{2/} 18 RR 1793, 1798 (1959).

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television station, and by implication looked to the day when an applicant would make possible a second service for Laredo. As succeeding paragraphs will demonstrate, the Commission's judgment was not misplaced.

32. The Laredo Economy. Notwithstanding the impression which Southwestern has sought to create, Laredo actually has a sound and growing economy. From official census figures (MSA), it can be seen that there has been steady growth throughout the twentieth century.

<u>1910</u>	<u>1920</u>	<u>1930</u>	<u>1940</u>	<u>1950</u>	<u>1960</u>
22,503	29,152	42,128	45,916	56,141	64,791

Turning to retail sales figures, Standard Rate and Data Service shows the following for the period 1959-64 (in thousands):

<u>1959</u>	<u>1960</u>	<u>1961</u>	<u>1962</u>	<u>1963</u>	<u>1964</u>
\$56,517	\$59,554	\$65,965	\$67,048	\$67,760	\$72,347
				(January 1964)	

It is true that Laredo shows relatively low average family income, but this has been true historically and has little to do with the over-all economic health of the area. Moreover, comparing 1963 to 1964 figures, it is readily apparent that a favorable trend is working:

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Sales Management Survey of Buying Power

<u>Annual Income</u>	<u>1963</u>	<u>1964</u>
0 - \$ 2,500	51.1%	48.4%
2,500 - 4,000	20.3	21.0
4,000 - 7,000	18.0	18.6
7,000 - 10,000	4.8	5.6
Over 10,000	5.8	6.1

Finally, the 1963-64 ARB-TV Market Survey Guide credits Laredo with 13,400 television homes — a better than 7% increase in TV homes from older figures which Southwestern quotes, and the May 1964 issue of Television Magazine credits Laredo with 14,600 homes and effective buying power of \$80,841,000.

33. Appendix C attached hereto includes further pertinent statistical data pertaining to the general economic trend in Texas, and specifically Laredo. This material shows business activity rising, unemployment declining and the Laredo-Nuevo Laredo area undertaking large capital improvements. The data, much of which includes current figures strongly supports the thesis that Laredo, has a strong and growing economy.

34. But statistics tell only part of the story. Appendix D attached hereto is Juliet K. Wright's report "Laredo has Broad-Based Economy." Also attached is the

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same author's report "Leaders Confident of Laredo's Future Progress." These reports reflect not only the solid economic foundation upon which Laredo can build for the future but also the measures now underway. The latter of these includes reports of interviews with Laredo community leaders, including the Mayor, the Director of City Planning, and Chamber of Commerce officials, as well as interviews with Nuevo Laredo community leaders. Perhaps these meetings are best summed up by Laredo Mayor Martin and Director of City Planning Garza. Mayor Martin observed:

"Laredo is in an era of progress. Merchants report business was greater this past Easter week than ever before. Laredo is in its greatest growth period. Business is good. We are on the threshold of the most progressive era in the history of our community'."

And Director of City Planning Garza commented:

"Things are going great in Laredo. There is so much construction you wouldn't believe it. Laredo will be the major gateway from the United States to Mexico and Central America when the super Pan American Highway opens this summer'."

35. Appendix E attached hereto consists of selected excerpts from 1964 issues of various South Texas newspapers. These stories depict the surge of economic growth which is occurring in Laredo — Nuevo Laredo. A typical report is that which appeared in the South Texas

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Citizen for January 23, 1964, that U. S. Rubber has opened a new multi-million dollar tire proving ground just north of town (Appendix E-5). These press items suggest the economic direction in which Laredo is moving — steadily forward.

36. But the Commission does not have to rely on statistics or the various documentations furnished herewith. It can accept the word

Southwestern's own sales brochures for Station KGNS-TV. Appendix F attached hereto contains such materials, which, it is believed, are in current use. Therein, Southwestern describes Laredo - Nuevo Laredo as "South Texas' Most Economically Active Market," as the "greatest land-based port-of-entry for produce material and tourists on Mexican border," and as "America's second (per capita) apparel market." Moreover, it claims that combined retail sales for the two Laredos as \$110 million (U.S. currency). If these expressions seem somewhat hard to reconcile with Southwestern's petition, even more striking are the figures for population and television homes claimed for both Laredo and Nuevo Laredo. The petition conveniently overlooked Nuevo Laredo (except as a source of competition) — larger in population than Laredo and with an additional 6,242

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television homes.^{1/} Southwestern's sales materials also boast of the gain to Laredo from the recent tax cut, while again its petition conveniently overlooked this economic prospect.

37. Actually the whole subject of Laredo economy is tied in with the fact that Laredo and Nuevo Laredo (and their surrounding areas) together constitute the television market. As pointed out above, Southwestern's petition relies upon Laredo alone for many of the statistics which it cites (e.g., population, retail sales, etc.), while only recognizing the existence of Nuevo Laredo as a source of competition from other media. The combined market is really quite substantial, more accurately described in Southwestern's sales materials (Appendix F) than in its petition. There, Southwestern estimates Nuevo Laredo at 91,000 (or 95,000); moreover some responsible citizens of Laredo estimate that Nuevo Laredo is even larger, containing perhaps 105,000 persons. KSIX considers that Nuevo Laredo, with its direct and indirect sales prospects, its glamour, its uniqueness, its multi-

^{1/} Apparently Southwestern has been less than cautious in its use of figures. Appendix F-5 claims that Station KGNS-TV has an ERP of 9 kw visual, using an antenna at 245 feet AAT. If so, this should come as a surprise to the Commission since the KGNS-TV license indicates otherwise. For a detailed comparison of what Southwestern tells its potential advertisers with what it tells the Commission, see Appendix G-2 attached hereto.

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tude of advertiseable businesses, its draw for tourists from both countries, and its over-all merchandisability, is a huge advantage to a United States station in Laredo.

38. KGNS-TV's Financial Position. As previously set forth Southwestern simply has not told enough about its financial situation. It has not shown a breakdown of its revenues or operating expenses, and it has not explained the accounting procedures used to allocate costs between the common TV and AM operations — in short there is no way to tell what is the station's present financial position. —^{1/}

39. However, even accepting Southwestern's claim to marginal economic status, a number of observations can be made with respect to such situation. In entering the Laredo market one of the dominant considerations for KSIX is that the market is receiving indifferent service. Station KGNS-TV's comparatively weak signal and constricted

^{1/} To be sure the Commission has available to it some of this data in Annual Financial Reports. This, however, is not appropriately considered since Southwestern did not request official notice of it. The burden to plead facts was upon Southwestern. Moreover, absent a request for official notice, KSIX would have no way to examine and respond to this otherwise confidential information. Finally, the information on file in Annual Financial Reports, even if official notice was appropriate, falls far short of the level of specificity appropriate to pleading a Carroll issue.

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contours (see Appendix A) do not provide anything approaching adequate coverage, and the mediocrity of this service no doubt accounts in part for whatever competitive difficulties Southwestern has experienced. Southwestern does not even cover Webb County, the Laredo MSA. By improving facilities Southwestern could reasonably expect to improve service to Laredo and Nuevo Laredo and thereby strengthen its competitive position. It should not be heard to complain about economic injury if it has the possibility of improving facilities to counter that difficulty.

40. Further, apart from the question of improved facilities, it would appear that there are in fact significant opportunities for increasing local business. The number of media competitors earmarks the market as an excellent one from the local standpoint;^{1/} the continuing improvement in the Laredo economy, as documented herein, must offer an aggressive sales force many opportunities to increase local sales. To write off a large proportion of the retail community as advertising prospects, as Southwestern states it has, is unreal, unfair and unnecessarily

^{1/} Appendix H attached hereto, a release by the Texas Daily Press League, Inc., depicts another medium's view of the market.

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defeatist in attitude. It is a question of persuading the retailer that television is his best route to persuade more people. Based upon KSIX's experience, retailers of soft goods and small portable items can be persuaded to use television; it is not enough to make calls; the retailer must be shown and persuaded what television can do for him.

41. It may be that Southwestern's admittedly high spot rate will not attract small retailers. But there is no reason for Southwestern to persist in a high rate if it is receiving little advertiser use (based upon total billings it would appear the station is not realizing its full potential).

It is possible, of course, that lower spot rates on television would cut into Station KGNS (AM)^{1/} sales as well as other media revenue, but surely a shield against competition for an existing television station cannot be justified on the basis of providing a shield against competition for a commonly-owned AM station. KSIX has analyzed with some care the potentialities of the Laredo market, including Laredo and Nuevo Laredo. As set forth

^{1/} It is interesting to note that Southwestern was not worried about depressed conditions when it applied for Station KGNS (AM) in 1959, which application it continued to prosecute until grant. The station went on the air in 1961.

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in Appendix G-4 attached hereto, there is substantial reason to believe that Southwestern could increase, in significant degree, its total revenues.

42. These matters serve to illustrate the lack of support for Southwestern's assertion that it is now obtaining all possible advertising revenues from the market, and that advent of a new service, with attendant inroads on advertising revenues, would render it unable to serve the public interest. As shown the market has not been exhausted and Southwestern, if it elected to do so, could improve its revenue position in the market. As will be shown in succeeding paragraphs, however, even if advent of a new service need result in injury and loss to Southwestern, it does not follow that such loss need or would affect its public service programming.

43. Effect Upon Station KGNS-TV. Apart from the fact that Southwestern was obligated to show specifically how its public service programming would be impaired by advent of a new service in the market, which it did not do, the realities are that such programming need not be impaired. Appendix I attached hereto is the affidavit of Eugene M. Looper who has made a detailed analysis of Station KGNS-TV's programming, utilizing the published

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newspaper logs for the station for the first quarter of 1964. The analysis points out that Station KGNS-TV telecast its public service programs on the most economical basis, between network periods and adjacent to local commercially available programs. Mr. Looper points out:

"In most instances, it appears that KGNS-TV merely lends its facilities to certain groups desiring to appear on TV. It does not create or produce these programs. They are pre-packaged by the participants. All of them can be telecast without on-camera rehearsals. The facilities and the staff of the station are in no wise taxed or put to any unusual effort. These programs are 'walk on — walk off' types of presentations.

. . . .

". . . . It is difficult to see how KGNS-TV could save any money by eliminating the small amount of programming which it schedules at convenient times where all facilities are available without additional cost. There are no direct program expenses — the participants supplying their own programs.

"If KGNS-TV dropped every sustaining program from its schedule, it still could not eliminate a single person from its 15-man staff, a minimum staff for a station presenting local commercials and news programming."^{1/}

44. The impression that the Laredo public would be losing significant local programming if it lost Station

^{1/} In KAKE Television and Radio, Inc., FCC 64-412, released May 11, 1964, R.R. 2d (1964), the Commission noted that curtailment of certain kinds of local programming may involve no economies whatsoever.

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KGNS-TV entirely, which Southwestern seeks to leave, is scarcely justified. Appendix J attached hereto is a copy of a programming letter which the Commission felt appropriate to send to Southwestern in connection with its most recent renewal application. The fact that Southwestern's license was ultimately renewed does not minimize the gulf between promise and performance, as revealed by the composite week.

45. Again, referring to Mr. Looper's analysis of the KGNS-TV programming for the first quarter of 1964 (Appendix I), he reports not a single live discussion program treating public issues, not a single live agricultural program, and not a single live religious program on Sundays, as well as other deficiencies. He also refers to the single most frequently presented program, "Bingo," which fills two and one-half hours weekly. "Bingo" is described as a "typical game-show based on the time-honored format of that title."

46. By comparison KSIX proposes to offer the Laredo public a balanced service of local programming. Included are live programs in the religious, agricultural, educational, news and discussion categories. As discussed in more detail in paras. 52-55, infra, the KSIX program schedule was developed upon the basis of careful

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sensitivity to the programming needs of the Laredo community. The programs include Sunday religious services, a weekly local discussion program, a week-daily educational program of instruction in the English language, a weekly farm and ranch program, as well as others. Although KSIX does not here suggest or imply that the Laredo community would be better off without Station KGNS-TV, it does urge that the pedestrian quality of Southwestern's operation, as compared to the service which KSIX proposes, indicates that if there were only room for one station the public would be better served if that were KSIX's proposed operation.

The 307(b) Question

47. Southwestern urges that KSIX's application raises a question of whether there would result "a fair, efficient, and equitable distribution of television facilities" within the meaning of Section 307(b) of the Act (Petition, para. 61). The argument, though somewhat obscure, seems to be another way of expressing the Carroll issue, in view of Southwestern's reliance upon the assertions that grant would destroy Laredo's (presumably Southwestern means Southwestern's) local programming and that "only a 'satellite' is proposed." There would appear to be no necessity to reargue the question of effect upon

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Southwestern's meager local programming (see paras. 43-45, supra). Concerning the "satellite" question, it has already been pointed out that KSIX does not consider its proposal a "satellite" operation (see para. supra).^{1/} However, the question is not merely one of opinion, and KSIX will address itself to the legal question.

48. In KAKE-TV and Radio, Inc., FCC 64-412, released May 11, 1964, ___ RR 2d ___ (1964), the Commission recently had occasion to consider what constitutes "satellite" operation. In that case, the facts of which were somewhat similar to this proceeding, the applicant for a Garden City, Kansas station, was proposing to rebroadcast the programs of a commonly-owned station, except that:

"On May 1, 1964, the applicant filed an amendment to its application which modified its programming proposal so as to provide for the origination, from the Garden City studios, of local live programs, which will constitute at least 5% of the total broadcast time of the station per week. The programs, presented on

^{1/} If Southwestern considers KSIX's proposed operation "satellite" in nature, one wonders how it would characterize Station KGNS-TV's operation, which is, after all, based upon rebroadcasting network programs (approximately 90 hours weekly) from San Antonio stations plus such local, live programming as it offers. Surely, if the KSIX operation would be "satellite" in nature, Southwestern's present mode of operation should be similarly characterized.

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a daily, regular basis, would consist of live news, weather, market and farm information, and public service programs, directed specifically to the needs and interests of local viewers, and oriented to the Garden City area. Thus, characterization of the applicant's proposal as one for the operation of a satellite station is no longer valid." (Emphasis added).

49. Here, KSIX has proposed from the outset 6.2% local, live programming. Such programming would be presented on a daily, regular basis, including live programming in the religious, agricultural, educational, news and discussion categories. As more fully set forth in paras. 51-55, infra, it would be addressed to and responsive to the needs and interests of local viewers. Just as the KAKE case presented no question of satellite operation, this application presents no such question.^{1/}

50. Notwithstanding Southwestern's alleged concern with Section 307(b), its petition conveniently overlooks one of the true Section 307(b) considerations applicable to this application. Under the Sixth Report and Order the first priority is to provide a first service. KSIX's application not only proposes a second service and station

^{1/} The KAKE case presents another interesting analogy. There the Commission gave decisional weight to the importance of an additional service for Garden City, where the service was a third service to the market. Here, presumably more weight should attach to this importance since KSIX proposes a second service to most of its coverage area and a first service to some of that area.

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for Laredo (with greater signal strength than Station KGNS-TV now provides), but it proposes a first service to an area encompassing over 1,800 square miles. It is true that at present this area is not densely populated, but that population is important to the market. As Chairman Henry recently pointed out:

"For millions of Americans with low incomes, the glow of the television set is one of life's few lights. That glow may often be dull, with programs to match, but who can say that its extinguishment is a matter of no concern?

". . . The rancher in the isolation of Wyoming's mountains — the Indians on Arizona's outlying reservations — the inhabitants of farm houses all over the country — all are entitled to share in the benefits of the national television system." (Emphasis added).^{1/}

The Programming Question

51. Southwestern has attempted to raise a question of whether the KSIX proposed program service would be responsive to the programming needs of the Laredo community. At the outset KSIX wishes to point out that it proposes to construct a full television station, with studio and full live program production facilities. In this connection it contemplates a very substantial investment in the television future of Laredo.

52. Concerning KSIX's efforts to ascertain the programming needs of the Laredo community, a brief summary of

^{1/} Address, NAB Convention, Chicago, Illinois, April 7, 1964.

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the steps which KSIX has taken will set the record straight.^{1/} Mr. Vann M. Kennedy, KSIX president, has had this application in mind since 1957. During this period (and even prior thereto) he made trips to Laredo and studied at close hand the need and economic potential for a second U. S. television station at Laredo, and KSIX staff members have visited, studied and analyzed the needs of the community. Mr. Kennedy, in addition to his research of the Laredo market, is an experienced broadcaster in the Southern Texas area, and he has personal knowledge growing out of that experience of many of the problems which affect communities like Laredo.

53. On the basis of the aforementioned studies and Mr. Kennedy's personal experience and knowledge, the program schedule which is contained in the application was prepared. It was felt that this schedule contained substantial time segments for programming of a public service character, and that the local programs were sufficiently flexible to permit serving a wide range of community needs. Since the KSIX application was filed with the Commission, and particularly since Southwestern has challenged whether the KSIX program proposal would be responsive to community needs, KSIX has undertaken to con-

^{1/} No showing was made in this regard in the KSIX application, since FCC Form 301 asks for none.

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duct detailed interviews with in excess of thirty-five Laredo community leaders. KSIX has confirmed, on the basis of those interviews, that its programming proposal would be responsive to community needs, and that the programs proposed are sufficiently flexible in concept to be responsive to a wide variety of problems.

54. The history of one proposed program will serve to illustrate the way in which KSIX programming has been planned to meet community needs. Mr. Kennedy was aware, long before the KSIX application was filed, that the proximity of Laredo to the Mexican border gave rise to a high incidence of persons of Spanish-Mexican background in Laredo and Nuevo Laredo. Because many of these people do not speak English, or speak English poorly, they experience various difficulties in obtaining employment, housing, etc. Mr. Kennedy decided, therefore, to incorporate a weekday program of English instruction ("Ingles Poco a Poco") in the program schedule, which was in fact done. Subsequent interviews with Laredo community leaders, including educators,^{1/} served to con-

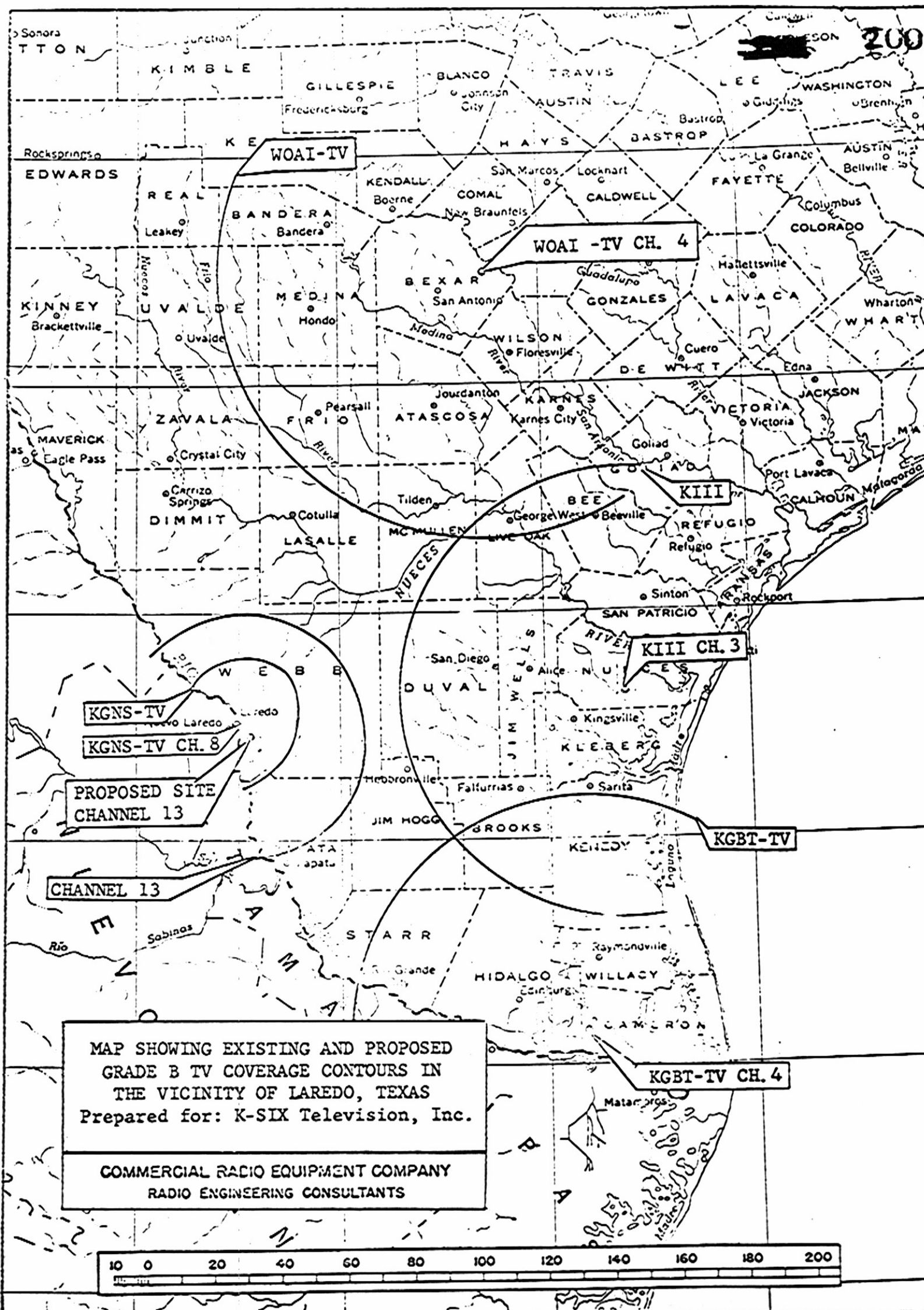
^{1/} Among the persons interviewed with respect to the need for this type program offering were Miss Hermelinda Ochoa, Elementary School Coordinator for Laredo Public Schools and Director of Pre-School English Program; J. W. Dixon, Superintendent of Laredo Independent School District; Carlos Cantu, in charge of retraining program for ARA under the Manpower Act; and Right Reverend Monsignor George Gloekner of Blessed Sacrament Church.

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firm the importance to the community of such a program — one not available on Station KGNS-TV.

55. It is represented that the KSIX program proposal was based upon a careful evaluation of the Laredo community's programming needs. The final judgment of what programs would be offered was, of course, the decision of the applicant. That decision took into account both its study and knowledge of the market and the economic realities which necessarily attend commencing a new station. KSIX believes that the programming proposed represents a substantial and responsible proposal consistent with licensee responsibility to program in the public interest. KSIX represents that if this application is granted it will continue to be sensitive to the needs of the community to be served and the station will be operated at all times in the public interest.

* * * * *



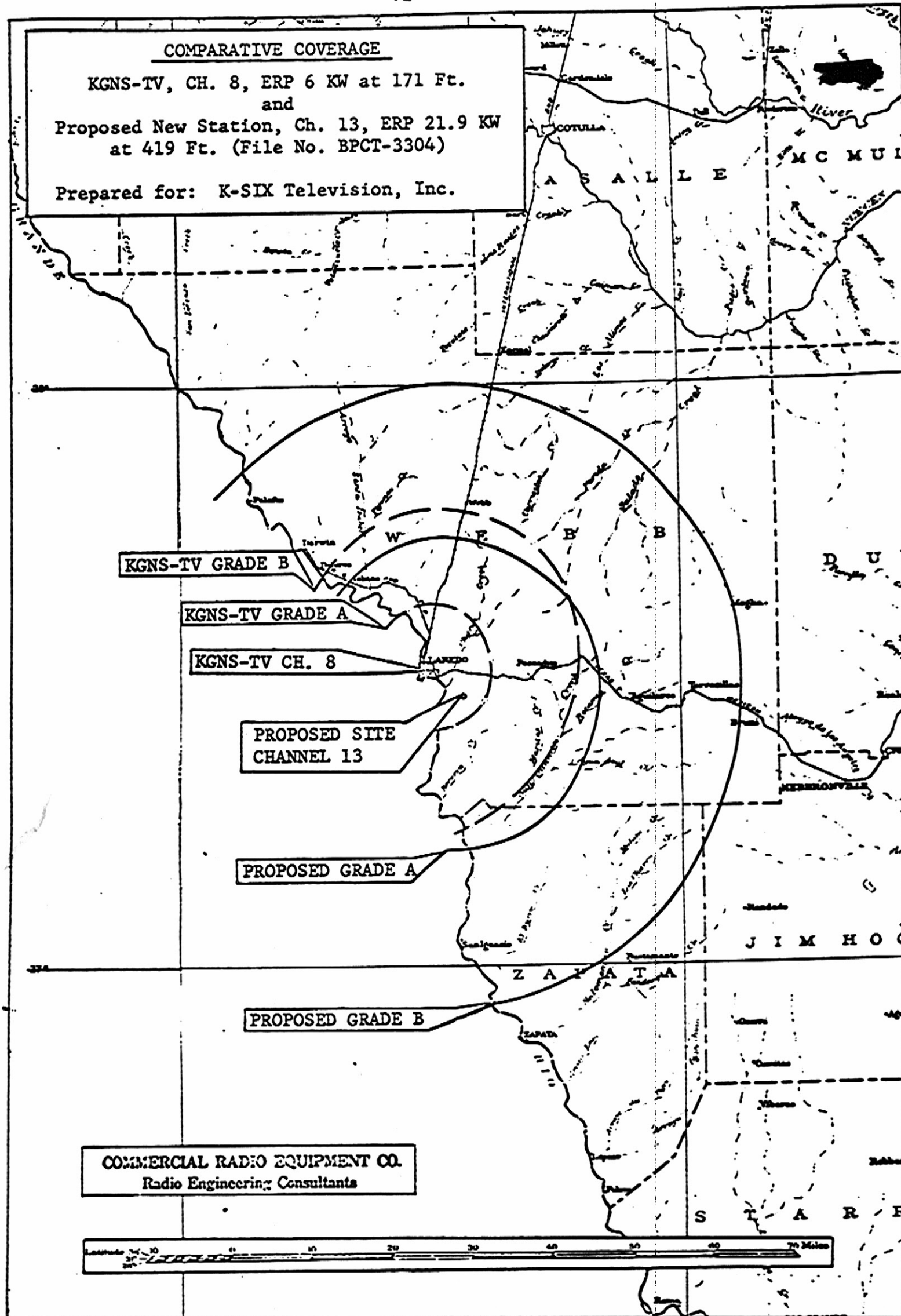
MAP SHOWING EXISTING AND PROPOSED
GRADE B TV COVERAGE CONTOURS IN
THE VICINITY OF LAREDO, TEXAS
Prepared for: K-SIX Television, Inc.

COMMERCIAL RADIO EQUIPMENT COMPANY
RADIO ENGINEERING CONSULTANTS

COMPARATIVE COVERAGE

KGNS-TV, CH. 8, ERP 6 KW at 171 Ft.
and
Proposed New Station, Ch. 13, ERP 21.9 KW
at 419 Ft. (File No. BPCT-3304)

Prepared for: K-SIX Television, Inc.



COMMERCIAL RADIO EQUIPMENT CO.
Radio Engineering Consultants

COMMERCIAL RADIO EQUIPMENT COMPANY
Radio Engineering Consultants
Washington, D. C.

TABLE A

STATEMENT OF AREA AND POPULATION

Comparative Study of

The Grade A and Grade B Contours of

KGNS-TV, LAREDO, TEXAS

CH 8, ERP 6 KW at 171 Feet

and

PROPOSED, LAREDO, TEXAS, BPCT-3304

CH 13, ERP 21.9 KW at 419 Feet

<u>Contour</u>	<u>Area (Sq. Mi.)</u>	<u>Population</u>
KGNS-TV:		
Grade A	99.9	60,994
Grade B	658	62,273
PROPOSED Ch. 13:		
Grade A	676	62,032
Grade B	2544	65,049

NOTE: The area figures given above were determined by the use of a planimeter on the original map and include land area within the U. S. only.

The population figures are based on 1960 U. S. Census data and were determined by plotting the contours on a Texas Census County Division map and totaling the populations of the CCDs included in each. Uniform distribution of population within each CCD was assumed. The population figures, of course, include U. S. Population only.

The RIO GRANDE



LAREDO
U.S.A.

NUEVO LAREDO
MEXICO

**A mighty tributary that Flows
THROUGH South TEXAS'
Most Economically Active Market.**

LAREDO / NUEVO LAREDO

THE STATION

KGNS-TV, Channel 8 - NBC-CBS-ABC

**Laredo's Only Television Station
offering you PENETRATION of
18,442 TV Homes.**

**Between the hours of
6:30 PM - 10:00 PM**

**KGNS-TV reaches an average of
6,700 homes per quarter hour*.**

**Plus approximately 3,800 homes in
Nuevo Laredo.**

**10,500 Homes / 42,000 People
KGNS-TV is the BEST Advertising
Buy for Laredo / Nuevo Laredo.**

(Continued)

THE MARKET

LAREDO U.S.A.

- Number one gateway to Mexico
 - Number one land based Port in USA
 - Number one Tourist & Convention City on the Border

Population _____ 66,600

Buying Power per Family _____ \$4,149.00

Total Households _____ 15,300

Total TV Homes _____ 12,200

- AND -

NUEVO LAREDO, MEXICO

- Largest City in Mexico within 150 Miles

Population _____ 91,000

Buying Power per family _____ \$13,485.00 (MEX. CY.)

Est. Total Households _____ 21,206

Est. Total TV Homes _____ 6,242

ADD IT UP!

TOTAL TV HOMES - 18,442

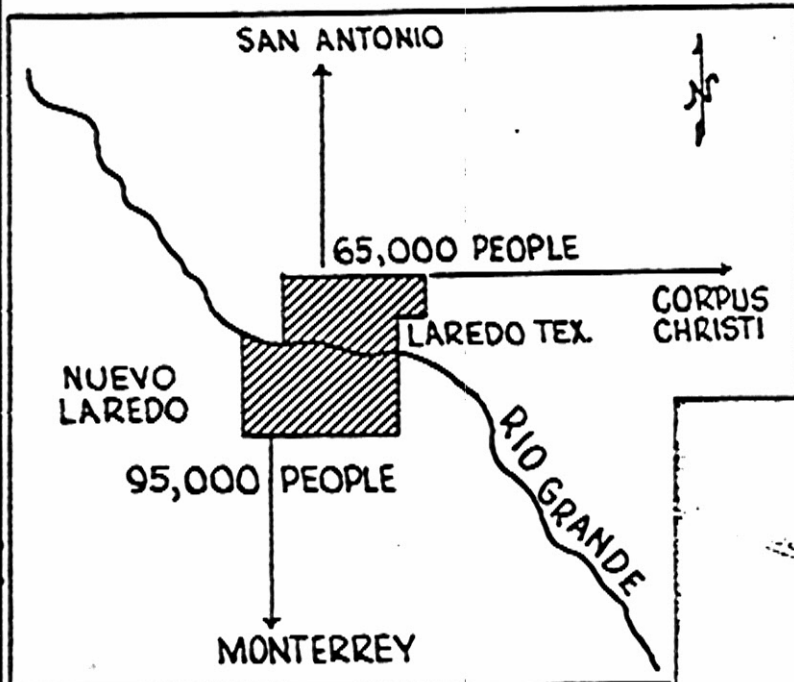
AVAILABLE TO YOU HERE ON THE
MIGHTY RIO GRANDE

KGNS-TV

Laredo, Tex.-Mex.

150 MILES TO:

- SAN ANTONIO
- CORPUS CHRISTI
- MONTERREY

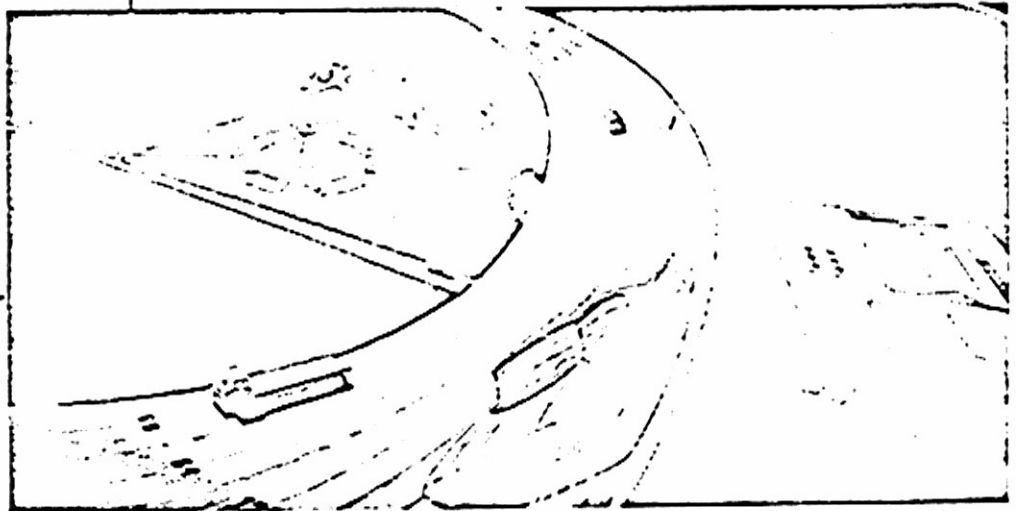


LAREDO: RETAIL SHOPPING CENTER FOR NORTH MEXICO

GREATEST LAND-BASED PORT-OF-ENTRY FOR PRODUCE MATERIAL AND TOURISTS ON MEXICAN BORDER.

COMBINED RETAIL SALES FOR BOTH LAREDO'S TOTAL

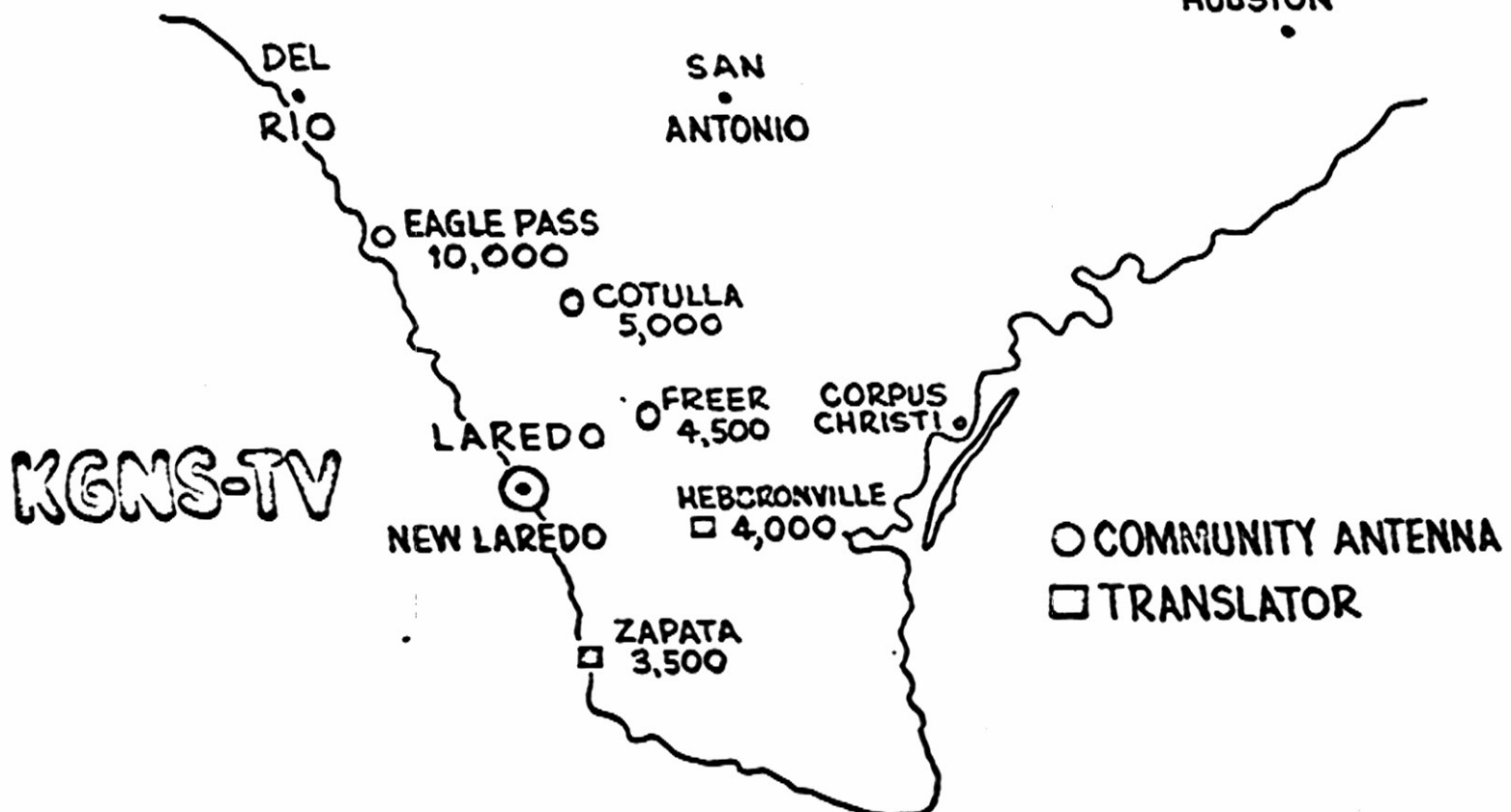
\$110,000,000 (U. S. Currency)



U. S. Rubber's \$1 1/2-million LAREDO Test-Track; now building for October use. 5 miles. 6,500 acres. Built for 200 mph speeds, 25 years from now. Texas produces more rubber than any other state or nation in the world! Laredo tests it here!

WACO

HOUSTON



Let's Take A Look At Laredo!

*America's Number 1 Port of Entry, 1958.

*International Bridge Traffic, 1958:

U. S. to Mexico, daily average
13,783 people; 4,190 vehicles.

Mexico to U. S., daily average
17,066 people; 4,317 vehicles.

*In last 5 years, Webb County's (Laredo)
Vehicle registrations gained 4% faster
than average for entire State of Texas!

*Laredo is America's second (Per-Capita)
Apparel market; exceeded only by Tallahassee,
Florida.

*Laredo is America's ONLY market with
APPAREL exceeding AUTOMOBILE sales!

*One of America's oldest cities, Laredo
has served under SEVEN nations:—Spain,
France, Mexico, THE REPUBLIC OF THE
RIO GRANDE, the Republic of Texas, the
Confederate States of America and the
United States of America.

*Laredo is the railhead of the only
System between the United States and
Mexico City, Rep. Mex.

KGNS-TV

THE "GOOD NEIGHBOR STATION"
at the GATEWAY to LATIN AMERICA

LaReDo, TEX.
MEX.

(AMERICA'S NUMBER 1
PORT of ENTRY, 1958.)
RATE CARD NUMBER 4B

GENERAL RATE CARD

JANUARY 1, 1960

For reference by advertisers; not a specific offer of facilities.
Rates subject to change without notice except as specified in
contracts.

Licensed to, and operated by, SOUTHWEST OPERATING CO.,
INC., full time.

Effective Radiated power:

→ 9 k/w, video

5 k/w, audio

Antenna Height, 245 feet above average terrain.

Studio and transmitter:

820 Convent, Laredo, Texas.

P. O. Box 1378, Laredo, Texas

Phone Randolph 3-3674

TWX LA 243

Operates on Central Standard Time (no DST). Air time 11:00
A. M. to Midnight (or later), daily.

Channel 8, VHF.

CBS — ABC — NBC

INTERCONNECTED PRIVATE MICROWAVE

APPENDIX F-6

LAREDO, TEXAS

Webb County

Withholding drop from 18% to 14% means 22.2% reduction in amount taken from check. (18% - 14% = 4%. 4% is 22.2% of 18%.)

7/1/62-6/30/63 Expendable Income (or net "Take-Home Pay") after taxes out \$71,665,000

Increase by 22% to establish Gross Pay; before Withholding or Social Security taxes out \$87,431,300

18% of Gross determines amount of last year's Withholding total \$15,737,634

22.2% of Last Year's Withholding tax is increase in Take-Home Pay \$ 3,493,755

Market Retailers' portion of last year's Take-Home Pay (after cost of Residence) \$72,347,000

Increase Retailers' portion by 22% to establish Gross Take-Home before withholding or Social Security taxes out \$88,263,000

18% of Retailers' Share shows merchants' tax forfeit last year \$15,887,340

Based on usual retail ratio, Merchants in this market will gain this much yearly: \$ 3,526,989

RETAIL GAIN BY TYPE OF STORES:

Food	21.7%	\$765,357
General Merchandise	18.2	\$641,912
Apparel	16.9	\$596,061
Furniture	3.8	\$134,026
Automobiles	12.8	\$451,455
Gas & Oil	7.0	\$246,889
Lumber, Building & Hardware	6.7	\$236,308
Drugs	3.4	\$119,918
Miscellaneous	9.5	\$335,064

Source: Sales Managements "Survey of Buying Power".

Computations by: Donrey Media Group, Promotion-Central, 2/21/64.

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APPENDIX G-1

THE STATE OF TEXAS }
COUNTY OF NUECES }

J. B. PAYNE, JR., being duly sworn, deposes and says:

1. That he is a television sales executive, well qualified in this profession through more than fifteen (15) years experience in media representation and market research, and that he has been assigned by the Applicant to study and evaluate the Laredo market, and KGNS-TV from the standpoint of sales.

2. In accord with this assignment he has: (a) studied the Petition to Deny filed by Southwestern Operating Company; (b) gathered and thoroughly analyzed all information available from Standard, as well as other sources, on the Laredo market; (c) carefully evaluated the information in the Petition relative to the Laredo market and to KGNS-TV's financial standing; and (d) studied all available KGNS-TV promotion material and compared same with the allegations in the Petition.

3. That his professional qualifications are as follows: Over fifteen (15) years experience in advertising, advertising sales, market research and its use, and promotion. Employed by "San Antonio Light" on leaving college in 1948. Joined "San Antonio Express and News" in 1951. Served there as Manager, General Advertising, from 1956, to 1960. Responsibilities included all market research and analysis for these publications. Joined KZTV as National Sales Manager in 1960. Has served as Commercial Manager for KZTV since 1961. His responsibilities with KZTV have included all market research and analysis.

4. Deponent certifies that the facts and information contained in his attached statement are true and accurate to the best of his knowledge and belief.

/s/ J. B. Payne, Jr.

[JURAT the 20th day of May, 1964.]

APPENDIX G-2

CONTRADICTIONS FOUND IN A COMPARISON OF KGNS-TV's ALLEGATIONS
ABOUT LAREDO TO FCC AND KGNS-TV's PUBLISHED PROMOTION MATERIAL

As KGNS-TV Presents
Laredo to the FCC 1/

"Laredo's economy and population have suffered a decline . . ." (p. 12)

". . . the American Research Bureau indicates that Webb County has only 12,500 television homes. . ." (p. 12)

"The station is licensed to serve Laredo, Texas, with effective radiated power of six kilowatts and an antenna height of 170 feet above average terrain." (p. 2)

". . . the respective figures for effective buying income had fallen to \$66,707,000 (Webb County) and \$61,239,000 (Laredo)." (p. 12)

As KGNS-TV Presents Laredo
To Potential Advertisers 2/

". . . South Texas' most economically active market. Laredo/Nuevo Laredo." *

"KGNS-TV, Channel 8, NBC-CBS-ABC Laredo's Only Television Station Offering you PENETRATION of 18,442 TV Homes." ARB-Mar '62 *

"Effective radiated power
9 kw Video
5 kw Audio
Antenna Height, 245 feet above average terrain." **

"THE MARKET

Laredo U. S. A.

Buying Power per family \$4,149.00
AND

Nuevo Laredo, Mexico
Buying Power per family
\$13,485.00 (Mex. cy)
ADD IT UP! " *

1/ Southwestern (KGNS-TV)
Petition to Deny

2/ KGNS-TV Current Promotion
Pieces

* Rio Grande Flier, ARB Mar. 62

** General Rate Card, Jan. 1, 1960

*** Map Fact Sheet, 1963

APPENDIX G-3

KGNS-TV CONTRADICTIONS (Cont.)

As KGNS-TV Presents
Laredo to the FCC 1/

As KGNS-TV Presents Laredo
To Potential Advertisers 2/

"... the level of retail sales in Laredo is simply not sufficient to result in a large amount of local advertising revenues. . ." (p. 22)

"LET'S TAKE A LOOK AT LAREDO!

America's Number 1 Port of Entry.

International Bridge Traffic, 1958:

U.S. to Mexico, daily average

13,783 people; 4,190 vehicles.

Mexico to U.S., daily average

17,066 people; 4,317 vehicles." **

"LAREDO: RETAIL SHOPPING CENTER FOR NORTH MEXICO.

"GREATEST LAND-BASED PORT-OF-ENTRY FOR PRODUCE MATERIAL AND TOURISTS ON MEXICAN BORDER." ***

"... Webb County is the only market in the United States where retail expenditures for wearing apparel exceed the retail expenditure for automobiles on a consistent basis." (p. 21)

"In last 5 years, Webb County's (Laredo) Vehicle registrations gained 4% faster than average for entire State of Texas!

"Laredo is America's second (Per Capita) Apparel market; exceeded only by Tallahassee, Florida . . ." **

"... the retail sales of Webb County for 1962 totaled \$65,525,000." (p. 22)

"Combined Retail Sales for both Laredo's Total \$110,000,000 US Currency." ***

1/ Southwestern (KGNS-TV)
Petition to Deny.

2/ KGNS-TV Current Promotion
Pieces

* Rio Grande Flier, ARB Mar. 62

** General Rate Card, Jan. 1, 1960

*** Map Fact Sheet, 1963.

EVALUATION OF KGNS-TV's MARKET STRATEGY

By

J. B. Payne, Jr.

The Southwestern Operating Company petition notes (page 20) that: "The highest one minute rate for KGNS-TV is \$50.00. Based on the ARB net weekly circulation figures, this results in a cost per thousand viewers of in excess of \$4.00. This is exceedingly high except for single station markets."

The petition also alleges (page 20) that: "... KGNS-TV is obtaining roughly the maximum revenues from national and regional accounts possible ... additional accounts might, of course, be obtained if rates were reduced but it is not believed that such action would result in corresponding increases in revenues."

Thus, there is an admission of the high rates characteristic of the monopoly, delivering an exceedingly high cost per thousand, coupled with a vague conclusionary opinion that reduction in rates would bring in more volume but no more revenue. No evidence is offered to support this opinion, other than "belief."

On the contrary, of ten times proper strategy in smaller markets calls for low rates and high volume. On the basis of the KGNS-TV annual volume quoted in the petition, and on rates from the May, 1964 issue of Standard Rate and Data, the station is only about 30% sold out. There is, therefore, every opportunity for substantial increases in volume, based on reduction in prices, to a level compatible with the size of the market, with consequent large increases in revenue and in profit. Perhaps, incidentally, one of the reasons KGNS-TV is priced so high is in order to avoid competing with KGNS Radio.

The petition further states (page 22): "Laredo itself, which had 1960 population of 60,678, had total retail sales in 1962 of \$64,428,000

while San Angelo had 1960 population of 58,815 and retail sales in 1962 of \$83,820,000. It is believed that San Angelo is more representative of the 'norm' than is Laredo."

No clearer indication of the high prices on KGNS-TV in Laredo can be brought to bear than a comparison of rates which shows that San Angelo's television station has prices varying from a high \$40.00 to a low of \$7.00 for a Minute as contrasted with KGNS-TV, with prices for a Minute varying from a high of \$50.00 to a low of \$16.50. (Source: Standard Rate and Data Service for use through May 15, 1964).

There are three (3) television stations in the Corpus Christi market; it can be reasonably presumed that each station will receive approximately 1/3 of national-regional spot revenues. Thus, only

[R. 261]

APPENDIX G-5

about 1/3 of KGNS-TV's national-regional advertisers would find their messages appearing on Channel 13 in Laredo, and it is only this portion of KGNS-TV's national-regional revenues that would conceivably be jeopardized by a grant of Channel 13 in Laredo to K-Six Television, Inc. In spite of the fact that Southwestern Operating Co., jumps to the conclusion that Channel 13 will be offered as a bonus, KZTV intends a realistic increase in price to cover the additional circulation available through Channel 13 in Laredo; there is no question of the advertiser receiving coverage in that market gratis.

Further, no advertiser will purchase time on KZTV in order specifically to reach Laredo, when that population is available to him at lower prices, relative to KZTV, through a direct purchase of KGNS-TV. No one is going to purchase a large volume of undesired circulation at a premium price in this circumstance. At this point it is relevant to note that the "cost per thousand concept" among time buyers is being replaced in a large measure by the "spot quota concept." Among other things, the latter calls for a specific "budget" and a certain "spot weight" in a given

market, based on the advertiser's desire to reach a particular population.

In any organization dependent on sales for its financial livelihood, Sales Management and Sales Personnel are the imponderable factors. The Southwestern Operating Co. petition does not show how much is being spent for sales, for sales promotion, for audience promotion, to increase viewing. It does not state how many salesmen are employed and what direction they receive, if any. It gives little or no information on which to base an opinion as to how well the KGNS-TV sales organization is living up to its opportunities. Further, there is very little material available in general distribution from KGNS-TV about the market and station. The general attitude exemplified in the petition is defeatist in tone, exhibiting no confidence in the present condition of the market, and no faith in its future, or the future of the station. They are content evidently to cling solely to the unimaginative, monopoly sales approach of high prices and no competition, making no effort to explore other avenues to increase revenues and profits.

[R. 266]

APPENDIX I-4

If KGNS-TV dropped every sustaining program from its schedule, it still could not eliminate a single person from its 15-man staff, a minimum staff for a station presenting local commercials and news programming.

News and weather programs are considered to be an essential part of every TV station's commercial programming. It is inconceivable that any TV station would be without this basic programming.

As long as this holds true, KGNS-TV can televise the modest amount of public service programming adjacent to its news periods with very little, if any, additional cost. It is difficult to see where KGNS-TV could save any money by cancelling its public service programming, these programs being a convenient by-product of commercially-available news and weather programs.

[R. 274]

[Rec'd-FCC-Jun. 23, 1964]

EXCERPTS FROM
REPLY TO OPPOSITION TO
PETITION TO DENY

Southwestern Broadcasting Company (herein "Southwestern"), by its attorneys, respectfully submits this Reply to the "Opposition to Petition to Deny" filed on May 21, 1964, by K-Six Television, Inc. (herein "K-Six"), as follows:^{1/}

INTRODUCTION

1. K-Six goes to great lengths in questioning the motives of Southwestern in this proceeding. It discusses in some detail the allocations situation in the South Texas area for the past several years. K-Six would have the Commission attach significance to the fact that Southwestern, since beginning operation in Laredo in 1958, has never sought to have Channel

^{1/} By letter dated May 28, 1964, (Reference 8820) the Commission extended the date for submitting this Reply to June 23, 1964. Accordingly, this pleading is timely.

[R. 275]

13 deleted from the Commission's Table of Assignments for Laredo. It jumps from this fact to the conclusion that the Petition to Deny was filed, not in good faith, but for purposes of delay. Nothing could be further from the truth. Southwestern carefully studied the Channel 13 proposal and the Laredo market before opposing K-Six on the bases asserted in the Petition to Deny. The limitations of the Laredo market are real. The pleadings of Southwestern are not casual or ill-considered. They are intended to advance the public interest.

2. No weight can fairly be attached to the fact that Southwestern has not attempted to have Channel 13 deleted from Laredo. The channel has remained unused since 1952 and, subject to the Commission's

determination herein, likely will remain so for a substantial period in the future.^{2/} K-Six, for this purpose, would ignore completely the relationship between KZTV in Corpus Christi and Channel 13 in Laredo. It would deny the existence of pressure which it would be in a position to exert with respect to its competitors both in Laredo and in Corpus Christi. The K-Six application poses a greater threat, economically, than would a

^{2/} Perhaps someday, if not now, Laredo will be able to support a second fully competitive television station which offers a genuine local service, not a mere repeater service for a Corpus Christi station.

[R. 276]

proposal advanced by an operator unable to exert economic leverage by virtue of its rebroadcasts of a Corpus Christi facility.

3. Southwestern is not stating that it would not oppose an application filed by an "independent" applicant. As with the K-Six proposal, it would study carefully any application for Laredo to determine the effect which it might have on Southwestern's operation and on the public which Southwestern serves. Clearly, the effect of an "independent" operation would be less detrimental than that which would be experienced in the event of a grant of K-Six's Channel 13 application.

4. We cannot overlook the interesting position advanced by K-Six that Southwestern should have raised its economic argument through the rule making forum. K-Six vigorously opposed the assignment of Channel 3 to Corpus Christi in Docket No. 13194, a proceeding which is discussed in its Opposition. Its principal contention was that Corpus Christi could not support a third commercial television facility!^{4/} In that proceeding the

^{3/} Report and Order, 18 Pike & Fischer RR 1800.

^{4/} An unusual position for K-Six since it states in its Opposition that it has operated at a "substantial profit for some time." And it is interesting to examine the growth of Corpus Christi.

[R. 277]

Commission indicated that the economic limitation of the market was a matter which could be pursued in adjudicatory proceedings, after the channel was allocated. K-Six, on the basis of its experience in the Corpus Christi proceeding, should realize that economic injury cannot be "proved" at the pleading stage — facts can be advanced giving rise to an issue, but an evidentiary proceeding is required in order ultimately to determine the appropriate resolution of the issue.

5. On the subject of motives, K-Six is simply seeking to protect KZTV from the competitive effects of the third Corpus Christi facility. Mr. Vann Kennedy, President of K-Six, has so stated^{5/} and the history of the allocation of Channel 3 to that community lends further support to the proposition. Apparently in an effort now to cover that fact, K-Six's Opposition stands as an

^{4/} (Cont'd) Using Census figures and SRDS for 1963, the following can be seen:

1910	1920	1930	1940	1950	1960	1963
8,222	10,522	27,741	57,301	108,287	167,690	192,600

More revealing than Census figures, however, is the fact that based on the 1964 edition of Television Factbook KZTV covers 146,000 households and 121,700 television homes. KGNS-TV, on the other hand, covers 15,800 households and 12,900 television homes in the United States.

^{5/} See Appendix A hereto.

[R. 278]

admission that it has been less than candid in revealing "information" through its application. In view of K-Six's repeated assertion that the Commission must be shown facts, this is somewhat ironic since K-Six would change or color the facts upon which consideration of its application must turn to suit the end which it, at any particular time, hopes to serve.

6. Thus, in its application, it said:

"Because the Laredo market cannot support two commercial stations at the present time, the Applicant proposes large duplication of programs from KZTV, Corpus Christi, Texas, by off-the-air pickup and re-broadcast."^{6/}

And, by "estimating" that there would be no revenues during its first full year of operating the facility and indicating a minimal staff proposal, it implied that no independent rate structure or sales force would be established for the Channel 13 operation. The end which it sought to accomplish in making these representations to the Commission in its application can only be the subject of speculation since K-Six's principals alone know the facts. In view of the conversation which Mr. Kennedy initiated with an official of

^{6/} See BPCT-3304, Exhibit 7.

[R. 279]

Southwestern, it is believed that these representations, indicating supposedly that the effect of the Channel 13 operation on KGNS-TV would be minimal, were designed to forestall a petition to deny based upon the admitted inability of Laredo to "support two commercial television stations at the present time."^{7/}

7. Now, in its Opposition, K-Six asserts that it "recognized that the Laredo market would not support a second station with its extensive proposed programming if that station had to utilize expensive cable interconnection to receive network programs. . . . By its statement that the market cannot support two stations . . . this was all K-Six intended."^{8/}

K-Six should be complimented on its ability to draft a statement to which it later can assign a meaning inapposite to its clear language. Southwestern submits, however, that the facts are that Laredo cannot support a second United States commercial television station at this time and that K-Six recognized that fact, its present

^{7/} See Appendix A hereto.

^{8/} Opposition, pp. 4-5. In the same paragraph K-Six has implied that KGNS-TV secures network programming by off-the-air pickup from San Antonio stations. This is not the case. It does rebroadcast the signals of the San Antonio stations but it must rely on common carrier microwave facilities and in doing so expends \$945 per month.

[R. 280]

protestations to the contrary notwithstanding. Even accepting, however, K-Six's present assertion, both the statement and the "explanation" indicate a clear recognition by K-Six that Laredo is, at best, a marginal market.

8. Also in its Opposition, K-Six reveals that it will sell time in Laredo.^{9/} and establish rates which give recognition to Channel 13's coverage ^{10/} irrespective of the continuing representation in its application that there will be no revenues for the Channel 13 operation and in spite of Mr. Kennedy's express statement to the contrary.^{11/} It asserts, too, that it has responded appropriately to every question called for by FCC Form 301 — it did not estimate revenues because it wanted to demonstrate its ability to operate without them. This is not what is called for by the application form and, K-Six continues to estimate no revenues for its operation in spite of the fact that it has a continuing obligation to keep its application up to date. In fact, on May 21, 1964, K-Six amended its application with respect to estimated expenditures; this afforded it an ideal opportunity also to amend with respect to estimated revenues. It did not take advantage of this opportunity.

^{9/} Opposition, p. 5.

^{10/} Opposition, Exhibit G-5.

^{11/} See Appendix A hereto.

[R. 281]

9. These are not minor matters. Southwestern's principal contention is that Laredo cannot support at this time a second United States commercial television station. The impact which the Channel 13 operation would have on KGNS-TV and on the public cannot be determined if K-Six does not disclose the exact nature of its proposal. It is submitted that Southwestern, in its Petition to Deny, more than met the standard established in Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440. The fact that K-Six has now revealed, for the first time, that it apparently will "sell time" in Laredo makes the case even stronger.

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13. K-Six alleges that Southwestern has created a false impression with respect to the Laredo "economy"; it asserts that "Laredo actually has a sound and growing economy." Southwestern does not challenge the fact that Laredo has a "growing" economy. It recognized this in its Petition to Deny.^{14/} It does challenge the fact that Laredo has a "sound" economy or that the "growth" is unique.

14. K-Six conveniently overlooks entirely or skims over the three most important indicators of the soundness of the Laredo economy and its ability to support an additional United States television facility — family income figures, unemployment figures, and size.

15. In answer to the fact that approximately one-half the families in Laredo have income of less than \$2,500.00, K-Six

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^{14/} Petition to Deny, fns. 11 and 13. See also Appendix B hereto.

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asserts that "this has been true historically and has little to do with the overall economic health of the area." ^{15/} But, at no place in the Opposition is evidence given of the expertise of the author of that statement which permits such an assertion. To the contrary, the Bureau of the Census, the Area Redevelopment Administration of the United States Department of Commerce, the United States Department of Labor, and the Department of Agriculture all obtain and employ family income figures in connection with various projects. These are matters of which the Commission may take official notice.

16. Furthermore, K-Six makes no mention of the fact that the rate of unemployment in Laredo is generally over twice that of the national average. ^{16/} It ignores completely the fact that Laredo has been designated a depressed area and is now receiving assistance from the Area Redevelopment Administration.

17. The United States Congress considered family income and unemployment figures of vital importance to the economic health of an area when it adopted the Area Redevelopment

^{15/} Opposition, p. 24.

^{16/} The rate of unemployment for May 1964 is somewhat less than twice the national average owing to seasonal employment. See Appendix B hereto.

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Act of 1961. ^{17/} That Act established means whereby federal assistance can be given to economically depressed urban and rural areas. In determining whether a rural area qualifies for assistance under the Act, family income figures are looked upon as most important. In the case of urban areas, the rate of unemployment is determinative of a community's eligibility for assistance. At the time the Act was adopted, Laredo, Texas, was one of only 103 urban communities in the nation which qualified for assistance and the only such community in the entire State of Texas.

18. The significance of a high rate of unemployment to the economy cannot be exaggerated:

"The effects of localized unemployment are felt throughout the economic system. In our closely interrelated economy, no community is self-sufficient. Each area depends on other areas for markets for the goods and services it produces. Depressed conditions in one community are reflected in reduced demand in others which in turn results in fewer jobs. If allowed to continue, unemployment and economic stagnation may very well spread to other areas . . ." ^{18/}

^{17/} Public Law 87-27, 87th Congress, S. 1, May 1, 1961.

^{18/} House Report No. 186, U. S. Code Cong. & Ad. News, Vol. 2, 1961, at p. 1572.

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19. Southwestern readily concedes that Laredo's economy is growing. In fact, a Vice President of Southwestern has served with many of the important committees in the Laredo area which are responsible for this growth. It must be pointed out, though, that much of the construction presently underway relies for support on the Area Redevelopment Act. And many of the projects referred to in the Opposition have been, or are almost, completed.

20. It was no difficult task for K-Six to compile page upon page of quotations from people in the Laredo area with respect to the growth economically which the area is experiencing. ^{19/} Additionally, it was, no doubt, quite simple to obtain newspaper clippings concerning construction projects and similar matters in the Laredo area. But, it is fair to ask why such publicity is given these matters when the amount being expended in Laredo for construction projects does not constitute a significantly high figure. It is obvious that the community has been in such economic plight that growth is unique. Growth alone does not inherently

imply a sound economy; it does indicate that there is both need and room for growth. Laredo is not a "boomtown" as K-Six would urge.

^{19/} See Appendix B hereto. Leaders in Laredo are confident of the future but they also realize the community's limitations and almost uniformly question the economic feasibility of another television station. These people are not experts in television but their expressions are entitled to some weight.

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The figures when compared with national and regional statistics show that Laredo's growth is not as great as many larger and sounder Texas communities. ^{20/}

21. K-Six does not propose to construct a television station in Laredo five, ten or fifteen years from now. It proposes to do so now, when the most optimistic figures indicate that in Laredo and Nuevo Laredo combined there are less than 20,000 television homes to be served. ^{21/}

22. K-Six ignored totally in its one hundred page-plus Opposition the fact that Laredo is one of the smallest television markets in the country. The 1964 edition of Television Factbook discloses that of the stations for which figures are given, Laredo has fewer households and fewer television homes than any other station in the country, UHF or VHF, with the exception of one

^{20/} See, e.g., Opposition, Exhibits C-2 through C-3.

^{21/} Elsewhere in this Reply discussion is given to K-Six's unwarranted attacks on Southwestern's operation. A small number of television homes arguably might indicate low quality service. But, the 1964 issue of Television Factbook indicates that of the 15,800 homes in Laredo, 12,900 have television. This is an extremely high figure when consideration is given the fact that roughly one-half of the families in the community have annual income of less than \$2,500. And, in April of 1964, there were in Laredo only 15,321 electrical customers — business and residential combined!

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located in Selma, Alabama, operating with less than three kilowatts power.^{22/}

23. The picture does not change appreciably even if KGNS-TV is credited with reaching all of the television homes in Nuevo Laredo, estimated at approximately 6,200. It remains the fifth smallest television market in the United States; those smaller are, and are likely to remain, one station markets.

24. K-Six obviously is reaching for arguments to "bolster" the Laredo economy which simply do not exist. Thus, it would compare Southwestern's promotional materials for KGNS-TV with the arguments contained in the Petition to Deny^{23/} and would

^{22/} A station in Carlsbad, New Mexico, has more television homes in Laredo but two hundred fewer total homes and a smaller net weekly circulation than KGNS-TV. The station located in Riverton, Wyoming, has a larger number of total homes and television homes but less circulation than KGNS-TV. The Riverton station, it must be noted, is one which the Commission has gone to great lengths to protect from economic injury from CATV operations which clearly are less detrimental than competition from a second competing television station.

^{23/} Appendix G-2 to the Opposition, alleged "contradictions" between promotional materials and the Petition to Deny, borders on the ridiculous. It would be a waste of time and space to go through each alleged "contradiction" and point out the total inadequacy of Mr. Payne's assertions with respect thereto. The one contradiction was with respect to an error in power and antenna height and that constituted a simple mistake previously discovered and corrected.

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distort facts surrounding the market's economy. In the latter respect the Commission's attention is directed to Appendix B hereto. Southwestern naturally will emphasize the strong points of the Laredo economy in its promotional materials but this cannot bar it from realistically appraising its market when threatened with competition from a station which would use leverage engendered by rebroadcasting programs and commercials from a station in a much larger market. And, K-Six evidences extreme ambivalence when elsewhere in its Opposition it asserts that

Southwestern has maintained a defeatist attitude toward its market and makes no effort to improve its position. Even K-Six cannot validly assert at one point in its pleading that Southwestern should be punished for placing its market in the most favorable light and elsewhere say that it does nothing to advance its position with advertisers. ^{24/}

25. K-Six also criticizes Southwestern for not arguing the benefits Laredo derives by virtue of its affinity to Nuevo Laredo. K-Six, even though it has proposed no sales force, is greatly taken

^{24/} Since no useful purpose would be served thereby, Southwestern respectfully has refrained from "trotting forth" the circularized promotional materials of K-Six while it was vigorously opposing the prospect of increased competition in Corpus Christi.

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by Nuevo Laredo's "direct and indirect sales prospects, its glamour, its uniqueness, its multitude of advertisable businesses," etc. ^{25/} The fact is that in its present state of development Nuevo Laredo is one of the principal reasons for Laredo's economic problems. Additionally, K-Six implies that advertising income is readily available from Nuevo Laredo businesses. This simply is not the case. In its Petition to Deny, Southwestern set forth the basic rate structure of Nuevo Laredo broadcast facilities, both television and radio. It is impossible for a United States station to compete for advertising dollars at such rates.

26. Furthermore, representatives of Mexican concerns are at complete liberty to enter the United States and "sell" advertising on the Mexican facilities. The converse is not true. A representative of the United States seeking to sell advertising in Mexico must secure a work permit, something that is often difficult to accomplish. Additionally, to the extent that Southwestern and other concerns have made sales in Nuevo Laredo, they have generally faced serious problems in collecting moneys owed. Once again, K-Six would have it both ways. It would argue the attractiveness, such as it is, of Nuevo Laredo, to United States

^{25/} Opposition, pp. 28-29.

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concerns and elsewhere assert that other media located there are not to be considered from a competitive standpoint.

27. K-Six would also have the Commission believe that its entry into the Laredo market would have a beneficial effect on the operations of KGNS-TV owing to the fact that it would make life more difficult for the local community antenna television system. ^{26/} Southwestern does not believe that Channel 13 operating as proposed would improve the local entertainment picture to such an extent that it would place the CATV system out of business. CATV's survive in two station markets. Perhaps its number of subscribers would be reduced, but it would continue to be a viable entity in the Laredo area. ^{27/}

28. Finally in this respect, K-Six would have the Commission believe that the existence and the extent of competing media in the market have no bearing on its ability to support a second United

^{26/} It says, at p. 11 of Its Opposition: "The implication, in the absence of allegations of fact to the contrary, is that CATV operators will be hurt and free television (including Southwestern's station) will be helped."

^{27/} Another interesting aspect of the Corpus Christi allocations proceeding was that opponents of the Channel 3 assignment argued the existence of CATV systems in Port Lavaca and Victoria, Texas.

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States television station. There are now two television stations operating in Nuevo Laredo — Channel 2 "signed on" since the Petition to Deny was filed. There are six (previously seven) radio stations in that community and several Mexican newspapers that sell advertising in Laredo. K-Six apparently believes that advertising budgets are without limit. Southwestern knows better. The extent of competing media clearly is relevant both from an economic standpoint and from the standpoint of determining the extent to which there is serious need for a further outlet for public expression.

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31. K-Six asserts that one of the dominant considerations involved in the submission of its application was that "KGNS-TV's comparatively weak signal and restricted contours do not provide anything approaching adequate coverage."^{29/} Southwestern's service to Laredo meets the standards established in the Rules of the Commission. Additionally, it engages in continuing efforts to improve its service to the Laredo public. Since becoming the licensee of KGNS-TV, Southwestern has once increased power. In the past year, it expended some \$15,000.00 on improvements to its technical facilities. Southwestern and its consulting engineers are presently engaged in studies looking toward the feasibility both economically and technically of a further power increase. These studies were initiated last fall, long before K-Six submitted its application for Channel 13 in Laredo.

32. K-Six does propose to serve some "white" area, although there is a comparatively small population residing in it.

^{29/} Opposition, pp. 29-30.

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Southwestern submits that the "white" area factor should not be deemed a sufficient basis for impairing Laredo's only truly local television service without the prospect of an adequate replacement. The following considerations weigh against the strength of the "white" area argument in this respect:

- (a) As mentioned above, Southwestern is presently engaged in studies looking toward the feasibility of a power increase at KGNS-TV. Although Southwestern is not in a position presently to commit itself to file an application at any given time in this respect, it is highly unlikely that the area will long remain "white" irrespective of whether the K-Six application is granted.

(b) In making his engineering studies which accompany the K-Six Opposition, Mr. Lorentz assumed a uniform distribution of population among minor civil divisions. A brief glimpse at a map reveals that technique to be inappropriate to an area as sparsely settled as the one with which we are here dealing. Time did not permit a detailed population count by Southwestern. It is submitted, however, that before the "white" area aspect is made determinative, a detailed study should be undertaken to learn the exact extent of the population to be served.

(c) It has been demonstrated elsewhere in the pleadings that a grant of the K-Six application will effectively destroy the ability of KGNS-TV to expand or perhaps survive. Mr. Lorentz's engineering exhibit reveals that K-Six would leave unserved substantial "white" areas. There is room for doubt that those areas could be served by K-Six in view of the nearness of Corpus Christi to Laredo.

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A subsequent power increase might well be barred by the Commission's multiple ownership rules because of the resultant overlap of the contours of KZTV and a Channel 13 operation. There is a much stronger chance of substantial "white" area service being provided if KGNS-TV is not so "hamstrung" that it cannot expand its facilities when economies permit.

33. Southwestern submits, too, that the Commission should examine closely the K-Six application to determine its consistency with the philosophy of the Commission's multiple ownership rules which will become effective on July 16, 1964. ^{30/} There will be, concededly, no Grade B overlap between KZTV and Channel 13. But, the Commission in adopting the new rules eliminated its original proposal to compute

overlap on the basis of maximum facilities because, apparently, the problem sought to be solved by that method can be considered adequately on a case-by-case basis. The idea of computing overlap on the basis of maximum facilities was to prevent the authorization of facilities which because of "duopoly" problems, would be rendered incapable of subsequent improvements. The Commission indicated that the number of cases in which this would pose a problem would be small — this may be one of them.

^{30/} The rules were adopted following the submission of Southwestern's Petition to Deny. The "duopoly" provisions of the multiple ownership rules are applicable in view of K-Six's repeated assertion that it does not propose a "satellite" operation.

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37. Mr. Payne also asserts in his affidavit that no advertiser will purchase time on KZTV in order specifically to reach Laredo. Southwestern does not challenge this statement. What Southwestern has asserted, and will continue to assert, is that at the present time substantially all national and regional advertisers who advertise in Laredo also advertise in Corpus Christi. If Corpus Christi can be "bought" and the message there transmitted into Laredo, little purpose would be served in making a separate purchase of Laredo. It is obvious that this will result in a reduction of revenues at KGNS-TV and will, no doubt, also affect the business of the other Corpus Christi stations. ^{32/}

38. Mr. Payne's affidavit is used as a basis for the assertion in the Opposition that K-Six has "substantial reason to believe that Southwestern could increase in significant degree, its total revenues." As indicated above, Mr. Payne is simply not qualified validly to make such an observation and obviously, in view of his

^{32/} K-Six would also question the continuing use of the "cost per thousand" standard for advertising purchases. Southwestern's experience is that "efficiency", measured by CPM continues to be national and regional advertisers' "watchword." Computer techniques have permitted an evaluation of other matters as well but the "numbers game", as the Commission knows, continues to be played with great vitality. K-Six also argues that Southwestern will realize increased network compensation to offset losses. In view of its rate of compensation, any increased network

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assertions about the San Angelo situation, he has not adequately studied the situation. Southwestern, which has operated in Laredo for a number of years and works in the market on a day-to-day basis, is by far the more competent authority to make judgments in this respect. It is submitted, too, that the Commission, with its records, can determine, subject to the fact that Laredo is unique, the extent to which Southwestern has failed to recognize the potential of its market.

Effect on the Public

39. Southwestern illustrated in its Petition to Deny that a grant of the subject application would result in severe financial losses to KGNS-TV. Since broadcasters must recognize some return on capital investment, it follows that public service and sustaining type programming will be affected. Southwestern cannot, and does not believe that the Carroll case demands that it assert which public service program or announcement would be the first "to go." Too many variables are involved in reaching such a decision. Southwestern has shown that if the K-Six

^{32/} (Cont'd) revenues derived by KGNS-TV from a "loss" of CBS affiliation would be minimal. Furthermore, the existing rates are based on present conditions and there is no guarantee that they will be maintained if another service dilutes further KGNS-TV's coverage.

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application is granted it will lose irreplaceable revenues; that its expenses in producing live programming are greater than for other programs and that it would turn to revenue producing or less expensive items in an effort to offset losses. Nothing more is required.

40. K-Six apparently hopes to offset this fact by a "who cares" attitude which is in utter disregard for the public of Laredo. Thus, a Mr. Looper, apparently sat at a desk in Corpus Christi and made value judgments about KGNS-TV's programming on the basis of newspapers. Mr. Looper may be extremely talented, but Southwestern does not believe that his insight into a station's programming is quite that penetrating.

41. Mr. Looper did spend a period of time in Laredo and "viewed some of [KGNS-TV's] programming" but this is hardly adequate to permit him to make the self-serving judgments which are contained in his affidavit. And, it seems he watched very little of KGNS-TV programming at that, in view of his emphasis on "Bingo." Mr. Looper's "studies" were undertaken after the Petition to Deny was submitted on March 24, 1964. "Bingo" was deleted from the KGNS-TV schedule on March 27, 1964, after being carried for twenty-six weeks. Since the Petition had reference to current live programming no mention

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was made of "Bingo." "Binbo" was well received in Laredo, but heavy programming expenses forced its discontinuance.

42. The real test of a station's programming is in its acceptance by the public. Attached hereto as Appendix B is an affidavit and report prepared by Mr. Robert C. Tipton concerning interviews conducted in Laredo to obtain attitudes of community leaders toward KGNS-TV's programming. These people take a somewhat different view of KGNS-TV's programming than Mr. Looper. It should also be pointed out that K-Six's representatives apparently asked community leaders about the quality of

KGNS-TV's programming and the need for additional service. For example, Reverend Richard G. Urban, Pastor of Christ Church Episcopal in Laredo, said to Mr. Tipton, in answer to a question directed toward the need of an additional television station in Laredo:

"I was asked that question by a person, not connected with KGNS-TV to my knowledge, recently, and my answer is still the same. No point in a new station that I can see. KGNS-TV does an excellent job in public service information and interest, and good local programming. As for the time offered the ministerial association, we make good use of it and KGNS-TV offers all we need."

43. K-Six also challenges the "balance" of KGNS-TV's programming, again on the basis of Mr. Looper's newspaper "studies." The most recent programming analysis prepared by KGNS-TV gave

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rise to the following percentages with respect to programming types:

Religion	4.15%
Agriculture	.75
Education	3.55
News	9.15
Discussion	4.25
Talks-Sports	16.25 <u>33/</u>

Southwestern also analyzed the programming of KZTV for the week ending April 4, 1964, and it obtained the following figures:

Religion	2.34%
Agriculture	1.59
Education	1.65
News	8.20
Discussion	—
Talks-Sports	3.58

44. K-Six next sings the praises of the programming which it proposes to bring to Laredo, and which it would present with a staff of only seven fulltime employees. The Opposition in this context seems entirely unrelated to the application. Southwestern has been subjected to criticism from K-Six for its schedule of local

33/ All stations associated in ownership with Southwestern prepare four programming analyses a year on the basis of dates supplied after they have passed. In this manner, along with others, a constant check on many aspects of station programming and the manner in which stations are meeting commitments made to the Commission and their obligations to the public which they serve is maintained.

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live programming. We find, though, that K-Six's proposed live programming is scheduled entirely during the earliest periods of its broadcast day. Thus, Monday through Friday, its only live productions would occur between 7:00 a.m. and 7:45 a.m. On Saturday it proposes one half hour program beginning at 11:30 a.m. — sign-on time. On Sunday it has scheduled two hours of live presentations beginning again at sign-on time — 10:00 a.m. — hardly a peak viewing period.

45. More discussion is given K'Six's programming proposal in connection with the proposed "Suburban" issue. It must be emphasized, though, that KGNS-TV has received widespread public acceptance of its local live and public service presentations. K-Six was unable, although it apparently tried, to secure statements from public leaders to the contrary and, insofar as is known, also failed to secure expressions of a need for its proposed service.

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50. More significant is the fact that the "history" of "Ingles Poco a Poco" as contained in the Opposition has one glaring omission — a program by the same title appears presently on the schedule of KZTV. This fact reduces to a great extent the credibility of the statements contained in the Opposition that the programming "idea" was developed by virtue of a survey of the Laredo market.

51. "Ingles Poco a Poco" does not stand alone in this respect. "Laredo Round Table", "Border Press Conference", "Laredo Daybook"

and "Farm and Ranch", are the only live programs on the proposed schedule for Channel 13 which do not have counterparts presently appearing on the KZTV schedule, and these programs, by virtue of their titles, do not appear "original" in conception. They are programs suitable to any community without the necessity of a survey.

52. In addition, we find K-Six proposing a program for Channel 13 called "Laredo Chapel"; presently KZTV presents "Corpus Christi Chapel." K-Six also proposes for Channel 13

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programs entitled "Servisios Religioso en Espanel" and "La Voz del Seglar Catolico" — programs with exactly the same titles presently appear on the KZTV schedule. K-Six has hardly formulated an original schedule of programs for Laredo as it would have the Commission believe.

53. Another relevant question concerning local programming concerns the K-Six proposal with respect to noncommercial, or public service, announcements. K-Six proposes a staff of seven fulltime employees and it indicates in its Opposition that the KGNS-TV staff of fifteen is at a minimum because of "switching" and similar duties which must be performed. Apparently, then, K-Six will not, to any great extent, present NCSA's of special interest to Laredo — it will simply rebroadcast those carried in Corpus Christi. ^{36/}

54. The only indication which we have of how K-Six arrived at its programming format is contained in the Opposition. Since the application form does not call for this information, K-Six asserts, it did not supply it. The information contained in the Opposition with respect to programming hardly meets the

^{36/} This admittedly is speculation since so little is known of the nature of its proposal. See, infra, pp. 36-37.

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burden established by the Commission in its Programming Report of 1960 and in its decision in the Suburban case. Further information must be elicited from K-Six in an evidentiary hearing.

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APPENDIX A

STATE OF ARKANSAS

COUNTY OF SEBASTIAN

Roy J. Bowman, being duly sworn, deposes and says:

The following is a summary of a conversation held between me, Roy J. Bowman and Mr. Vann Kennedy, General Manager of KZTV-TV, Corpus Christi. This telephone conversation was originated by Mr. Kennedy and came after the press wires had carried the reports of the filing for Channel 13, Laredo by KSIX, Inc. The conversation herein described is correct and true to the best of my recollection.

On Wednesday, February 19, 1964, Mr. Vann M. Kennedy called me to discuss the Channel 13, Laredo application which had recently been filed with the FCC by KSIX, Inc.

Mr. Kennedy stated he knew the application was startling but he felt it would help him hold the national spot business of KZTV by offering the additional sets in the Laredo area. He continued the conversation by saying he did not think this move would hurt the local or national billing of KGNS-TV. Further, he stated he did not intend the sell in the local market and proposed to soften the impact of another television station in Laredo in order to not ". . . disturb the rather delicate balance you have finally achieved over there . . ." In this conversation he said he knew that Laredo could not presently support two fully competitive television stations.

This statement preceded, as I recall, the quote noted above.

This same day Mr. William Harrell, General Manager of KVOZ-Radio, Laredo called me to discuss a conversation he had just had with Mr. Kennedy. The tenor of which was nearly identical to the one I had earlier.

Deponent certifies that the facts and information herewith submitted under his name are true and accurate to the best of his knowledge and belief.

/s/ Roy J. Bowman

STATE OF ARKANSAS
COUNTY OF SEBASTIAN

On this 19th day of June, 1964, before me Helena Maria Vesa a Notary Public, duly commissioned, qualified and acting, within and for said County and State, appeared in person and within-named Roy J. Bowman to me personally well known, who stated that he is the Vice President of Southwestern Operating Co., a Corporation, and is duly authorized in his respective capacity to execute the foregoing instrument for and in the name and behalf of said corporation, and further stated and acknowledged that he had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 19th day of June, 1964.

/s/ Helena Maria Vesa
Notary Public

My Commission expires October 10, 1967

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APPENDIX B

STATE OF TEXAS ()

COUNTY OF WEBB ()

Mr. Robert C. Tipton, being duly sworn deposes and says:

That on or about May 28, 1964, he contacted Mr. Roy Bowman, general manager, KGNS-TV, in person, concerning possible employment. That pertinent information relative to morals, habits and character, work experience, and references, was required; a formal application was filed.

That on June 2, 1964, he was again interviewed and placed in employment that date. That prior to the June 2, 1964 interview he was unaware of the type employment or project he would be engaged. That on that date, June 2, 1964, the project was explained, and he entered an employment agreement with the management of KGNS-TV, Laredo, Texas.

That on June 2, 1964, he was given the opportunity to study a petition to deny, filed by KGNS-TV, Laredo, Texas, and the opposition to petition to deny, filed by K-SIX Television, Inc., Laredo, Texas, concerning an application by K-SIX for construction permit to construct a new television broadcast station to operate on Channel 13, Laredo, Texas.

That he began interviews in Laredo, Texas on June 3, 1964, to find facts in this matter, and that attached to this affidavit are summaries of interviews which he conducted and which he prepared immediately following the interviews.

That in addition to the attached summaries of interviews there is an attached summary of facts as were found by him during his investigation concerning this matter.

Deponent certifies that the facts and information herewith submitted under his name are true and accurate to the best of his knowledge and belief.

/s/ Robert C. Tipton

[JURAT the 23rd day of June, 1964.]

SUMMARY OF FACTS FOUND BY
ROBERT C. TIPTON

I was afforded an opportunity to study the contentions of both K-Six and Southwestern in this matter prior to undertaking my studies.

The facts herein summarized were obtained from investigation and interviews. The interviews, as reconstructed here, were not screened by my employers; the remarks of every person talked to concerning the issue at hand are contained in this report.

I did learn during my investigations that Laredo is a more progressive community and further on its way to economic stability than I previously realized. It is believed, though, that conditions in Laredo must be viewed realistically, with an eye towards the point at which the current growth began.

I found that many statements in the K-Six Opposition to Petition to Deny are simply assumptions not supported by fact. Examples are:

(a) Contained in K-Six's Opposition are several references to the multi-million dollar project of the U. S. Rubber Company.

On the surface of these remarks one could be misled to believe that these millions were being poured into the Laredo economy.

The project has aided the Laredo economy principally through the employment of some one hundred and five local persons. The millions referred to were and are being spent in the purchase and development of a site, not into the Laredo economy or development. Further, this project is for the testing of materials and items which are manufactured away from Laredo, not with sales.

(b) It was stated that the assigned personnel at the Laredo Air Force base would double by 1966.

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This is not true. Facts on this are found in the summary of an interview with Lt. John F. Maddigan.

(c) It appears in the writings of J. B. Payne, Jr., that KGNS-TV engages in monopolistic practices. There are no protests from local merchants, or other, offered as evidence. To the contrary, KGNS-TV is faced with competition daily, and from sources which undercut rates drastically. There are two television and seven radio broadcast stations in Nuevo Laredo which KGNS-TV competes with. Many local merchants, on the Laredo side, have stated that they use these mentioned stations principally because of rates. It might be added, too, that commercials from these sources are not restricted to one language. KGNS-TV also has commercial competition from radio in Laredo.

(d) The labor problem is not discussed realistically by K-Six. The current rise in employment which that report points out is good; but is owing principally to seasonal employment. There were, however, 3,614 persons in Laredo seeking employment through the Texas Employment Commission alone during the month of May, 1964. Although this represented 8.9 percent of the population — less than the two preceding months — it is still substantially above the national average. The average in Laredo two months earlier, prior to beginning the picking season, was 12.3.

A significant fact which cannot be overlooked is the basic interest, knowledge and ability of a community's leaders in furthering economic growth and development from every feasible avenue. In view of this, it is interesting to note the many times in the attached where community leaders point out that an additional television broadcast station would be detrimental to the economy; that Laredo cannot support two such stations; that there is hope that there will not be another station; that KGNS-TV has always and continues to offer and give full and adequate support to every cause.

Reverend Richard G. Urban,
Pastor of Christ Church Episcopal

A visit was made to Mr. Urban, and a request made for, an opportunity to view, and extract facts from, the survey of Diocese of West Texas.

Mr. Urban displayed pleasure in this request, and a sincere effort to assist with information of interest as to Laredo's growth and development. Facts and figures of this survey appear to have been those as found in the current Texas Almanac, and this reveals nothing concrete as to Laredo's future.

Mr. Urban, like many others, is aware of stepped up programs to further economy in Laredo. This, as it was pointed out, is good and as it should be, and he sincerely hopes that this, and future planning will continue as needed.

Mr. Urban was asked his views as to the need of an additional television broadcast station to better serve Laredo with public service and interest, and to, if possible, further economy. "I was asked that question by a person, not connected with KGNS-TV to my knowledge, recently, and my answer is still the same. No point in a new station that I can see. KGNS-TV does an excellent job in public service, information and interest, and good local programming. As far as the time offered the Ministerial Association, we make good use of it and KGNS-TV offers all we need."

* * * * *

[R. 335]

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

20554

* * *

August 18, 1964

Southwestern Operating Company
Box 1376
Laredo, Texas

Re: Petition to deny application of K-Six
Television, Inc. for a new TV broad-
cast facility, Channel 13, File No.
BPCT-3304, at Laredo, Texas

Gentlemen:

Reference is made to your petition to deny the above-numbered application for a construction permit for a new TV broadcast facility on the grounds that the area cannot support another station without a net loss or degradation of program service to the area.

The United States Court of Appeals in the case of KGMO Radio-Television, Inc., v. F.C.C., 2 R.R. 2d 2057 (1964), affirmed the principle set forth in the case of Carroll Broadcasting Company v. F.C.C., 258 F.2d 440 (1958) to the extent that the Commission may inquire into the question whether the economic effect of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest. However, at the time the Commission granted the application that was considered by the Court, it set forth illustrations of the type of additional information that must be submitted in support of a request for an economic issue. Missouri-Illinois Broadcasting Co., 1 R.R. 2d 1 (1963). The Court stated that the Commission could require the additional information. However, since the petitioner did not have notice of the additional pleading requirements necessary to support the specification of an economic issue the Court stated that, unless the KGMO matter was decided on other grounds, the Commission should permit the petitioner to amend and amplify its allegations in support of the petition.

The Commission, in the enclosed Memorandum Opinion and Order, adopted July 29, 1964, set forth, on Pages 3 and 4 thereof, the questions that must be answered to enable it to determine if you have alleged specific and material questions of fact that would require an evidentiary hearing on the economic issue.

Therefore, you are hereby being given an opportunity to amend your petition to deny in accordance with the enclosed Memorandum Opinion and Order in the Missouri-Illinois case (FCC 64-748) which was adopted July 29, 1964. The additional information that you may desire to submit in support of your request for an economic issue must be on file within sixty (60) days from the date of this letter. A copy of this data will be furnished to the applicant who will then have fifteen (15) days from receipt thereof to file opposition data. In the event that you do not submit the information in answer to the questions set forth in the enclosed opinion, the Commission will act on the application and the petition to deny as originally filed.

Very truly yours,

/s/ Ben F. Waple
Secretary

Enclosure

Applicant

K-Six Television, Inc.
Station KZTV
Show Room Building
Corpus Christi, Texas 78401

Applicant's
Attorney

McKenna & Wilkinson, Esqs.
1735 DeSales Street, N.W.
Washington, D. C. 20036

Petitioner's
Attorney

Haley, Bader & Potts, Esqs.
1735 DeSales Street, N.W.
Washington, D. C. 20036

[Signed By Above
Mailed By - Aug. 18, 1964]

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[Rec'd-FCC-Oct. 19, 1964]

Law Offices
HALEY, BADER & POTTS
Fifth Floor, Broadcasting-Telecasting Building
1735 De Sales Street, N. W.
Washington, D. C. 20036

* * *

* * *

October 19, 1964

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

This is with reference to your letter of August 18, 1964, to Southwestern Operating Company concerning the application of K-Six Television, Inc. for a new television broadcast station to operate on Channel 13 at Laredo, Texas, File No. BPCT-3304 (Reference 8820).

This is to advise you that Southwestern Operating Company will not submit additional information with reference to the K-Six Television, Inc. application.

If there are any questions concerning this matter, kindly communicate directly with this office.

Very truly yours,

/s/ Andrew G. Haley

cc: McKenna & Wilkinson
(Counsel for K-Six Television, Inc.)

[Released: Nov. 19, 1964]

B
FCC 64-1074
58605MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Cox dissenting.

1. The Commission has before it for consideration the above-captioned application, filed February 17, 1964, and pleadings filed in connection therewith.^{1/} The applicant requests authority to construct a new television broadcast station to operate on Channel 13, Laredo, Texas. The applicant is the licensee of Television Broadcast Station KZTV, Channel 10, Corpus Christi, Texas, a CBS affiliate, and plans to rebroadcast a substantial portion of the programming of Station KZTV. The petitioner is the licensee of Television Broadcast Station KGNS-TV, Channel 8, Laredo, Texas, and, as the only television station in Laredo, broadcasts programs of all three national networks. The applicant proposes to locate its main studio at its transmitter site which is outside the corporate limits of the City of Laredo. The applicant has, accordingly, requested a waiver of Section 73.613(a) of the Commission's Rules, and the petitioner has interposed no objection to a waiver. On the basis of good cause shown, we find that a waiver is warranted.

2. Petitioner alleges standing as a "party in interest" in this proceeding on the basis that a grant of the application would result in the diversion of advertising revenues from Station KGNS-TV and would cause economic injury to the petitioner. The applicant concedes that it will solicit advertising revenues in the Laredo market and we find, accordingly, that the petitioner has standing as a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S. Ct. 693, 9 RR 2008.

3. Petitioner seeks the designation of the application on several issues. Petitioner contends that a grant of the application would be inconsistent with Section 307(b) of the Communications Act with respect

to a "fair, efficient and equitable" use of the channel because the applicant proposes a "satellite" operation in Laredo. Petitioner further requests

^{1/} The Commission also has under consideration: (a) Petition to Deny filed March 27, 1964, by Southwestern Operating Company; (b) Opposition filed May 21, 1964, by applicant against (a), above; and (c) Reply filed June 23, 1964, by petitioner against (b), above. The parties have each requested and been granted extensions of time within which to file their various pleadings.

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a Suburban issue^{2/} to determine the efforts, if any, made by the applicant to ascertain the programming tastes, needs and interests of the area it proposes to serve. Petitioner also alleges that the applicant is not financially qualified to construct, own and operate the proposed television broadcast station. The main thrust of petitioner's opposition, however, is its contention that Laredo cannot support a second television broadcast station, thus raising directly a Carroll question.^{3/}

4. Petitioner's contention that the applicant proposes a "satellite" operation in Laredo, thus raising a question as to whether such a use constitutes an efficient use of the channel, is disputed by the applicant. The applicant concedes that its programming will consist mainly of programs rebroadcast from applicant's Station KZTV, Corpus Christi, Texas, but the applicant points out that it will broadcast 6.12% live programming locally originated, and it will have an independent studio in Laredo equipped for such local originations. Of the 110 hours and 20 minutes per week which the applicant proposes to broadcast, approximately 6 hours and 45 minutes will be locally originated live programming. This compares with 5.57%, or approximately 5 hours and 40 minutes, of local live programming which the petitioner proposed in its application for renewal of its license in May 1962. The applicant states that, as the proposed station progresses, local originations will be increased. Under these circumstances, we are not prepared to say that the operation which the applicant proposes is a "satellite" operation, KAKE-TV and Radio, Inc.,

FCC 64-412, 2 RR 2d 688. Furthermore, an examination of the applicant's proposed Grade B contour compared with that of the petitioner's station reveals that the applicant's proposed Grade B coverage area far exceeds that of the petitioner's station and, in fact, the applicant's proposed Grade A contour is nearly coterminous with the petitioner's predicted Grade B contour. Additionally, operating as proposed, the applicant would bring a first television broadcast signal to 2,800 persons. It is clear, therefore, that the facts alleged by the petitioner do not support a conclusion that the operation proposed would not be an efficient one within the meaning of Section 307(b) of the Communications Act. The petitioner has made no other allegations to support its request for a 307(b) issue and we are not persuaded that such an issue would be warranted.

5. Petitioner alleges that the applicant has failed to show that it has made efforts to ascertain the programming tastes, needs and interests of the area which it proposes to serve. The applicant, however, states that it has visited, studied, and analyzed the needs of its proposed coverage area and that it has conducted detailed interviews with at least thirty-five leaders of the Laredo community. The applicant further states that its efforts have confirmed the validity of its programming proposal. On the basis of this showing, we conclude that a Suburban issue would not be warranted.

^{2/} Suburban Broadcasters, 30 FCC 1021, 20 RR 951; affirmed sub nom Suburban Broadcasters v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191, 23 RR 2016.

^{3/} Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440, 17 RR 2066.

[R. 341]

6. Petitioner's challenge of the applicant's financial qualifications is based, in large part, on the applicant's estimate of \$37,000 for first-year operating expenses and the applicant's assumption that it can operate for the first year without any revenues. The applicant, however, has

demonstrated that it has sufficient funds available to construct, own and operate the station as proposed, and the petitioner has subsequently conceded the adequacy of this showing. We think that the applicant has taken a realistic view in basing its financial showing on an ability to operate for the first year without revenues. Although its estimate of operating expenses for the first year may be low, the applicant has stated that it will furnish such additional funds as may be required and it has demonstrated, to our satisfaction, its ability to do so. The petitioner has stated that operating costs for the proposed new station would probably be close to \$80,000 for the first year, and the applicant has stated that it is willing to have its financial qualifications judged on this basis. Total costs of construction will be \$241,000. To meet the costs of construction, the applicant shows that it has equipment on hand valued at \$100,000, deferred credit available from General Electric Company of \$150,000, cash in excess of \$300,000 and that it will make available to the new station such profits from the operation of the existing station as may be needed. In view of the foregoing, it is apparent that the applicant is financially qualified to construct, own and operate the proposed new television broadcast station. Petitioner has also raised certain questions, allegedly connected with the applicant's financial proposal, concerning the applicant's plans with respect to selling time in Laredo, rates, and the origin of the commercial and non-commercial spot announcements which the applicant proposes to broadcast. In our view, these questions bear no relationship to the applicant's financial proposal and they are neither relevant nor material to a consideration of the matters with which we are here concerned. Moreover, in raising these questions for the first time in its reply to the applicant's "Opposition", the petitioner has failed to comply with the provisions of Section 1.45(b) of the Commission's Rules, which limits the reply to matters raised in the opposition.

7. The petitioner has raised certain ancillary questions relating to the applicant's reasons for filing the application, the size of the staff proposed as related to the applicant's estimate of first-year operating expenses, and the effect of a grant on the petitioner's affiliation with the

CBS network. The petitioner suggests that the applicant was motivated more by a desire to protect its competitive position in Corpus Christi than to provide a means of local self-expression to the people of Laredo. No facts are alleged in support of this assertion and, as pure conjecture, it must be rejected. Petitioner's question concerning the size of the staff proposed by the applicant is related to the petitioner's estimate of first-year operating expenses and, perforce, to the applicant's financial qualifications. The petitioner has not raised any question with respect to the adequacy of the staff proposed to effectuate the type of operation proposed. In view of our determination as to the applicant's financial qualifications, however, the question raised by the petitioner is moot. The petitioner also alleges that a grant of the application may result in the loss of the petitioner's CBS affiliation because Station KZTV

[R. 342]

is a CBS affiliate and the applicant would rebroadcast the network programming of Station KZTV. Petitioner, however, has alleged no facts to support its conclusions in this respect and, even if true, no showing has been made that it would adversely affect the public interest. We note, in this connection, that the petitioner's station broadcasts the programming of all three national networks. Moreover, if a grant of the application were to result in the loss of petitioner's CBS affiliation, such a development would not necessarily be inconsistent with the public interest, but might very well enhance the public interest by bringing to Laredo a full line of CBS network programming, and enabling the petitioner's station to increase its ABC and NBC network offerings.

8. Finally, the petitioner requests that the application be designated for hearing on a Carroll issue, alleging that the economy of Laredo is such that it could not support a second television station without diminution or loss of television service to the public. The facts alleged by the petitioner to support its request for a Carroll issue, however, were too generally stated, speculative, and not sufficiently related to the conclusions drawn by the petitioner to enable the Commission to determine

whether a Carroll issue would be warranted. Accordingly, by letter dated August 18, 1964, the Commission afforded the petitioner an opportunity to submit the type of information which we have stated that we consider necessary to support a Carroll issue.^{4/} By letter dated October 19, 1964, however, the petitioner advised the Commission that it "will not submit additional information". Consequently, we find that, in the absence of such information, a Carroll issue is not warranted.

In view of the foregoing, we find that the petitioner has failed to raise substantial and material questions of fact. We further find that the applicant is legally, financially, technically and otherwise qualified to construct, own and operate the proposed new television broadcast station and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the Petition to Deny filed herein by Southwestern Operating Company IS DENIED, and the application (BPCT-3304) of K-SIX Television, Inc., IS GRANTED, in accordance with specifications to be issued.

IT IS FURTHER ORDERED, That Section 73.613(a) of the Commission's Rules IS HEREBY WAIVED.

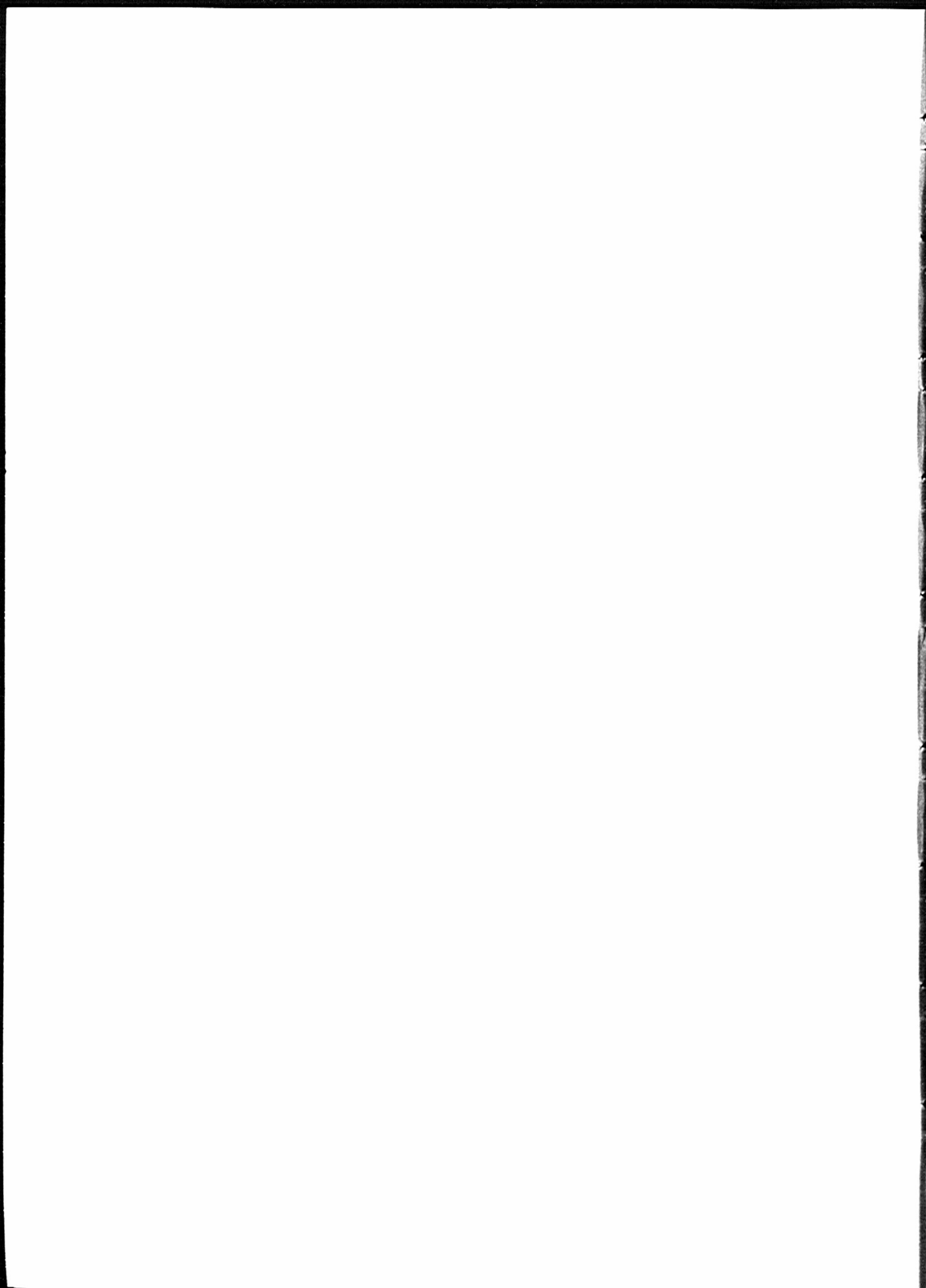
FEDERAL COMMUNICATIONS
COMMISSION

/s/ Ben F. Waple
Secretary

Adopted: November 18, 1964

Released: November 19, 1964

^{4/} Tree Broadcasting Co., FCC 63-673, 1 RR 2d 15; KXO-TV, Inc., FCC 63-759, 1 RR 2d 125; affirmed sub nom Valley Telecasting Co., Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___, 2 RR 2d 2064; Missouri-Illinois Broadcasting Company (KZIM), FCC 63-650, 1 RR 2d 1; remanded sub nom KGMO Radio-Television, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___, 2 RR 2d 2057.



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[R. 347]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

B

FCC 64-748
54293

In re Application of)

Jerome B. Zimmer and)
Lionel D. Speidel d/b as)

MISSOURI-ILLINOIS BROADCASTING CO. (KZIM))
Cape Girardeau, Missouri)

Has CP: 1220 kc, 250w, Day, Class II)

For Construction Permit)

File No. BP-15057

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has before it for consideration; (a) the decision in the case of KGMO Radio-Television Inc., v. F.C.C., 2 R.R. 2d 2057, Case No. 18064, decided May 22, 1964 by the United States Court of Appeals for the District of Columbia Circuit remanding the case to the Commission for further proceedings; (b) the "Motion to Dismiss Petition for Reconsideration" filed on June 5, 1964, by the above-captioned applicant directed against the "Petition for Reconsideration and Request for Stay" filed on April 12, 1963, by KGMO Radio-Television, Inc., licensee of standard broadcast station KGMO, Cape Girardeau, Missouri, which was directed against the Commission's action of March 13, 1963, granting without hearing the above-captioned application^{1/}; (c) the "Motion to Strike Missouri-Illinois Broadcasting Company's Motion to Dismiss" and the "Opposition to Motion to Dismiss" filed on June 18, 1964 by KGMO Radio-Television, Inc.; and (d) the opposition to the motion to strike and the reply to the opposition filed on June 26, 1964 by the permittee.

2. The Court of Appeals for the District of Columbia Circuit, in the KGMO case, affirmed the principle set forth in the case of Carroll Broadcasting Company v. F.C.C., 258 F. 2d 440 (1958) to the extent that the

Commission may inquire into the question whether the economic effect of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest. The Commission, at the time it granted the above-captioned application, stated that in addition to pleading the legal conclusion that a grant of the new proposal would injure the protesting existing station to the extent that the public interest would suffer a net loss or degradation of program service, the existing station must support the conclusion with specific allegations of fact sufficient to show that the existing station is a party in interest and that a grant of the application would be prima facie inconsistent with the public interest standards of Section 309 of the Communications Act of 1934, as amended. Missouri-Illinois Broadcasting Company, 1 R.R. 2d (1963). Also set

^{1/} 1 R.R. 2d 1 (1963)

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forth in the Commission's decision granting the application were illustrations of the types of information necessary to support an economic issue.

3. In the Motion to Dismiss, Missouri-Illinois contends that one of the purposes of the remand in the above-mentioned decision was to give the Commission an opportunity to determine if the KGMO petition for consideration was filed in accordance with Section 1.106 of the Commission's Rules in view of the failure of KGMO to file a petition to deny prior to grant. Missouri-Illinois also claims that the Court held that the Commission may decide the case on other grounds and that the Commission may in "its discretion consider and act upon any of its Rules." Missouri-Illinois then alleges that KGMO knew, at least one month prior to the KZIM grant, of the closing of the factory on which it based its petition for reconsideration and therefore KGMO could have participated prior to the KZIM grant. Missouri-Illinois also contends that because its construction permit has been stayed pending resolution of the proceedings, additional

reasons are present requiring early dismissal of the KGMO petition. However, Missouri-Illinois does concede that the decision permits the Commission to allow KGMO to supplement its allegations in support of its request for an economic issue.

4. In the motion to strike, KGMO claims that the motion to dismiss is in the nature of an opposition to the KGMO petition for reconsideration filed on April 12, 1963 and should be stricken as duplicative and not timely filed. KGMO also claims that even if the date of the remand by the Court of Appeals is the fixed date starting a new time period, it is also not timely filed. While Missouri-Illinois did not set forth the specific authority under which its motion to dismiss is filed, the Commission will waive the provisions of Sections 1.41 and 1.45 of the Commission's Rules to the extent necessary to permit consideration of motion on its merits. KGMO also filed an opposition to the motion to dismiss in which it urges that the Commission either immediately grant a hearing or permit KGMO to supplement its allegations in support of the economic issue.

5. In the reply to the opposition, the permittee reiterates its contention that KGMO in its opposition implicitly admitted that the only fact that occurred after the grant of the KZIM application was the closing of the second largest factory in Cape Girardeau and that KGMO had actual or constructive notice of the closing at least one month prior to the KZIM grant (at the time of the first newspaper announcement), and therefore could have ascertained all the facts prior to the grant. The remaining contentions of the reply are argumentative in nature.

6. However, the Court, in remanding the case to the Commission stated, among other things, that the existing station did not have notice of the pleading requirements necessary to support the economic issue, as set out in the Commission's decision granting the application and also stated that the Commission could, in its discretion, permit the existing

station to amend and amplify its allegations in line with the Missouri-Illinois case.^{2/} Upon consideration of the Court's decision, the Commission has decided to allow KGMO an opportunity to amend and amplify its allegations in the petition to deny pursuant to the decisions of the Court and the Commission. The questions set forth below should be fully answered as part of the amended petition for reconsideration. Even though it was stated in the Commission's decision, we again stress that the illustrations of the type of information necessary to support a Carroll issue set forth in the original Missouri-Illinois decision were not all inclusive. Therefore, in addition, any information that would aid the Commission in the disposition of the economic issue also should be submitted. The questions are:

- 1) What is the total amount of retail sales in the community and the area for the proceeding three years? If sales are in a decreasing pattern, set forth the reasons which should include information as to any unusual economic conditions in the area.
- 2) What is the total number of businesses in the community and the area?
- 3) What is the total advertising revenue potential in the community and the area?
- 4) What is the amount of local advertising revenue actually earned by our station in the community and the area?
- 5) Set forth, for at least the three preceding years, your total revenues, total expenses, net profit or loss and the average number of employees?
- 6) How many of the existing businesses in the community and the area do not now advertise on the radio?

^{2/} The Court in the concluding paragraph of the majority opinion stated:
"We think it is within the Commission's authority to require

more information than appellant give. But since the appellant had no notice, in the Commission's past decisions or otherwise that more would be required, the petition should not be denied on the ground that more was not furnished. We therefore remand the case to the Commission. Unless it decided the case on other grounds, it should permit appellant to amend and amplify the petition. The Commission may in its discretion consider and act upon any of its Rules."

As noted above, the Commission in its discretion will allow KGMO an opportunity to amend its petition for reconsideration.

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- 7) State, in detail, the specific advertisers that would shift their advertising to the proposed station. How many advertisers will split their advertising time between the existing station or stations and the proposed station?
- 8) What are the other competing advertising media in the community and the area?
- 9) State, in detail, how a grant of this proposal would cause a net loss or degradation of program service to the area.
 - a) What public service programs do you now broadcast?
 - b) How many public service spot announcements do you broadcast each week?
 - c) What public service programs would have to be discontinued? spot announcements?
 - d) What public service programs will have to be shifted to other time segments? spot announcements?
 - e) As to (c) and (d) what percentage of the total broadcast time is represented by the public service programming?
 - f) What is the cost of carrying these programs and what saving will be effected in dropping or shifting this programming? What is the cost of carrying the public service spot announcements and what saving will be effected in dropping or shifting spot announcements? What programming personnel changes will be required?

- 10) What information, if any, do you have that some or all of the public service programming will not be carried by the proposed station?
- 11) Will a grant of the proposal require you to make substantial changes in your total present program format and policies. State full details.
- 12) Set forth any other information which is sufficiently related to the economics of broadcasting, including the specific relationship between any assumed losses in revenue to the withdrawal of particular programs or program services in support of the question raised in petition to deny concerning the inability of the area to support another broadcast station without loss or degradation of program service to the area.

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7. The additional information that KGMO may desire to submit in support of its request for an economic issue must be on file within sixty (60) days from the date of this Memorandum Opinion and Order. A copy of this data will be furnished to the permittee who will then have fifteen (15) days from receipt thereof to file opposition data.

8. In the event that KGMO does not submit the information specified in paragraph 6, the Commission will dismiss the KGMO petition for reconsideration and dissolve the outstanding stay of the construction permit of Missouri-Illinois Broadcasting Co.

9. In view of the foregoing, the Commission is of the opinion that action with respect to the above-captioned proposal should be held in abeyance pending the further proceedings described above.

Accordingly, **IT IS ORDERED**, That the Motion to Strike filed by KGMO Radio-Television, Inc., **IS DENIED**; and that the provisions of Section 1.41 and Section 1.45 of the Rules **ARE WAIVED** to the extent necessary to permit consideration of the Motion to Dismiss Petition for

Reconsideration filed by Missouri-Illinois Broadcasting Co.;

IT IS FURTHER ORDERED, That further proceedings with respect to the above-captioned construction permit ARE HELD IN ABEYANCE pending completion of the proceedings as set forth herein;

IT IS FURTHER ORDERED, That if and when KGMO Radio-Television, Inc. timely files with the Commission such material as it deems necessary, a copy SHALL BE SERVED on the permittee.

IT IS FURTHER ORDERED, That the permittee, with within fifteen (15) days of the date of service of data from the permittee, SHALL FILE its opposition with the Commission.

IT IS FURTHER ORDERED, That the Motion to Dismiss filed by the permittee IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Adopted: July 29, 1964

Released: August 4, 1964

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

K-SIX TELEVISION, INC.,

Intervenor.

On Appeal From Order of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 23 1965

Nathan J. Paulson
CLERK

Of Counsel:

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Attorneys for Appellant

(i)

STATEMENT OF QUESTIONS PRESENTED

The parties have previously stipulated that the following questions are presented:

"1. Whether the action of the [Federal Communications] Commission granting without an evidentiary hearing Intervenor's application for a new television station to operate in the same community as Appellant's television station was contrary to Section 309(e) of the Communications Act of 1934, as amended, which requires the Commission formally to designate an application for hearing if a substantial and material question of fact exists with respect thereto or if the Commission is unable to make a finding that a grant would serve the public interest, convenience and necessity.

"2. Whether the action of the Commission granting Intervenor's application without evidentiary hearing or without requiring additional information of Intervenor was contrary to Section 308 (b) of the Communications Act of 1934, as amended, which requires that applications set forth such facts as the Commission by regulation or otherwise requires.

"3. Whether the Commission acted arbitrarily or capriciously or otherwise unlawfully in granting Intervenor's application without evidentiary hearing or without requiring additional information of Intervenor."

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§1.580 3

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

K-SIX TELEVISION, INC.,

Intervenor.

On Appeal From Order of the
Federal Communications Commission

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal requests the Court to set aside an order of the Federal Communications Commission (Commission) released November 19, 1964, which granted, without an evidentiary hearing, the application of Intervenor, K-Six Television, Inc. (K-Six), for a new television

broadcast station at Laredo, Texas, and denied a petition to deny the application submitted by Appellant, Southwestern Operating Company (Southwestern) (R. 339-342). The appeal was filed December 10, 1964. This Court has jurisdiction over the appeal under Section 402(b)(6) of the Communications Act of 1934, 48 Stat. 926, as amended, 47 U.S.C. §402(b).

STATEMENT OF THE CASE

Southwestern has operated television station KGNS-TV on Channel 8 at Laredo, Texas since September 1, 1958. Laredo had 1960 population of 60,678 and Webb County, in which it is located, 64,791 (R. 110). *Television Factbook* credits Laredo with only 12,900 television homes (R. 287) and in April of 1964, there were 15,321 electrical customers in the city, business and residential combined (R. 287). Using the most optimistic figures available, Laredo is the fifth smallest market in the United States being served by a local television station (R. 288). Generally, television advertising is purchased on a "cost per thousand homes" basis. This is a standard of efficiency recognized in the industry and the smaller the market, broadly speaking, the less efficient the "buy" becomes from an advertiser's standpoint (R. 101-102, 118-119).

On February 26, 1964, the Commission first gave public notice that it had accepted for filing the application submitted by K-Six for a new television station to operate on Channel 13 at Laredo. K-Six is the licensee of television station KZTV, Corpus Christi, Texas, located approximately 130 miles from Laredo.

In its application, K-Six said that "because the Laredo market cannot support two commercial television stations at the present time", it proposed "large duplication of the programs from KZTV, Corpus Christi, by off-the-air pickup and rebroadcast" (R. 62). The programming schedule submitted with the application showed that with a few exceptions on Saturdays, the local programming of the station would be broadcast in periods immediately adjacent to sign-on times. At all other times the station would rebroadcast KZTV programming (R. 25-31).

The K-Six application was appropriately filed on FCC Form 301, the instructions to which read, in part: "BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS FULLY ANSWERED . . ." (R. 2). At one point in the form an applicant is called upon to "give estimated revenues for first year"; to the query K-Six responded "None" (R. 20). An applicant is also called upon to give staffing plans and in doing so, K-Six did not indicate that it would employ advertising salesmen (R. 34). Furthermore, at the time the application was filed K-Six's president initiated a conversation with a Southwestern employee during which he said that K-Six did not intend to upset the delicate financial balance achieved by Southwestern but wished to protect KZTV's national advertising revenues. He stated further that he knew Laredo could not presently support two fully competitive television stations (R. 311).

Because of these facts, Southwestern proceeded on the assumption that K-Six would not solicit advertising revenues at a local level (R. 108).

On March 27, 1964, Southwestern filed with the Commission a pleading designated "Petition to Deny" pursuant to Section 309 (d) of the Communications Act of 1934, 48 Stat. 1085, as amended, 47 U.S.C. §309 (d), and Section 1.580 (i) of the Commission's Rules and Regulations, 47 C.F.R. §1.580 (i), by which the Commission was requested to set the K-Six application for evidentiary hearing (R. 99-142).¹ After securing extensions of their respective filing dates, K-Six submitted an "Opposition to Petition to Deny" on May 21, 1964 (R. 151-270), and Southwestern a

¹ The Commission may not grant an application for a new television station for at least thirty days after it has been announced as accepted for filing, Section 309 (b) of the Communications Act of 1934, 48 Stat. 1085, as amended, 47 U.S.C. §309 (b). In this instance, Section 1.580(i) of the Commission's Rules, supra, requires that the pre-grant petition to deny be submitted no later than thirty days after public notice is given that the application has been accepted for filing. Southwestern complied with all relevant pre-grant requirements and the questions here involved are far different than those presented in Valley Telecasting Co., Inc. v. Federal Communications Commission, ____ U.S. App. D.C. ____, 336 F.2d 914.

"Reply to Opposition to Petition to Deny" on June 23, 1964 (R. 274-332).²

The principal allegation of Southwestern was that the operation proposed by K-Six, if authorized, would result in such economic injury to Station KGNS-TV that it would be forced to curtail local and public service programming which would not be compensated for by the proposed service; otherwise stated, that a grant would result in degradation of programming service available to the public in Laredo.

Southwestern also questioned whether K-Six had formulated its programming proposal for Laredo with an awareness of the needs of the area to be served in mind consistent with existing Commission policies as reflected in such pronouncements as *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 Pike & Fischer R.R. 1901.

In addition, and as a result of disclosures made by K-Six in its "Opposition to Petition to Deny", Southwestern asserted that the Commission should require additional information of K-Six concerning its proposed operation, in the areas of sales, staffing and programming.

In support of the "Carroll issue"³ request, Southwestern submitted facts concerned basically with (a) the Laredo economy (R. 110-112); (b) competitive media in the area (R. 112-117); (c) the financial history of KGNS-TV's operations (R. 117-118); (d) the areas in which lost revenues would result to KGNS-TV (R. 122-125); (e) the lack of other sources of revenues (R. 118-122); (f) the extent to which KGNS-TV might achieve further operating economies (R. 126-133); (g) the programming of KGNS-TV (R. 129-132); and (h) the motives of K-Six in filing its application (R. 108-109, 311-312).

² This Court's opinion in KGMO Radio-Television, Inc. v. Federal Communications Commission, ____ U.S. App. D.C. ____, 336 F.2d 920, was issued May 22, 1964.

³ The description is derived from Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440.

The Petition to Deny was, as mentioned, predicated on the assumption that local time would not be sold and that advertisers on KZTV would receive the additional coverage as a bonus (R. 101-102, 109). Southwestern asserted that the rebroadcast arrangement proposed by K-Six would give it the leverage of being able to offer two markets at a lower cost to the advertiser than if Corpus Christi and Laredo were purchased separately (R. 122-125).⁴ Those advertisers who used the facilities both of KGNS-TV and KZTV would no longer find it necessary to buy advertising time specifically in Laredo because of the proposed rebroadcast arrangement (R. 122, 275-276). On the basis of dollar figures submitted, it was illustrated that the proposed operation would result in financial loss to KGNS-TV, as opposed to the modest gains which it had recognized in the past (R. 123-125). Since K-Six proposed only a small number of local presentations (scheduled almost without exception in periods adjacent to "sign-on" times when audiences are minimal) and since no noncommercial spot announcements suited particularly to Laredo would be presented, programming which KGNS-TV would be forced to delete would not be compensated for by the added service (R. 133-134).

In its Opposition to Petition to Deny, K-Six disclosed for the first time that it did intend to sell advertising time in Laredo (R. 157-158), and that independent charges would be established for KZTV advertisers whose messages would be transmitted in Laredo (R. 261).

Because of the conflicting statements which then were before the Commission, Southwestern urged the Commission to require a complete disclosure of K-Six's plans (R. 308-309). Southwestern asserted that it was impossible for it fully to assay the impact which a grant would have on its operations in the absence of additional information most of which was, in any event, required by the application form (R. 281).

⁴ The fact is quite clear that the arrangement would entail rebroadcast of all commercial announcements appearing on KZTV during rebroadcast periods. K-Six proposed only seven employees for Laredo operations; KGNS-TV presently has fifteen employees and K-Six has asserted: "If KGNS-TV dropped every sustaining program from its schedule, it still could not eliminate a single person from its 15-man staff, a minimum staff for a station presenting local commercial and news programming" (R. 266).

Nothing contained in the K-Six application gave any indication that its programming proposals had been formulated with an awareness of the needs of the public to be served in mind (R. 135-136). K-Six, in its Opposition asserted that it had, after the application had been filed, made some programming "contacts" which confirmed for it the fact that its proposed programming was suitable to Laredo. It supplied the Commission with a "history" of the formulation of one program on its schedule (R. 190-193). In reply, Southwestern showed that almost uniformly local live presentations contained in K-Six's proposed programming schedule had virtual counterparts in the local live schedule of KZTV and pointed to other inherent deficiencies in the schedule, such as the scheduling of local presentations (R. 304-308).

On August 18, 1964, the Commission, by its Secretary, addressed a "form letter"⁵ to Southwestern concerning the various pleadings which had been submitted. The letter was mimeographed with appropriate "blanks" filled in (R. 335-336). It was sent to other petitioners who had pleadings before the Commission based upon economic injury allegations.

In the letter, reference was made to the decision of this Court in *KGMO Radio-Television, Inc. v. Federal Communications Commission*, *supra*. The Commission enclosed with its letter a copy of its Memorandum Opinion and Order in *Missouri-Illinois Broadcasting, Inc.*, 3 Pike & Fischer R.R. 2d 232, by which, on remand, it permitted the appellant in the *KGMO* case to supply additional information in support of its request for an "economic injury" issue pursuant to *Carroll Broadcasting Company v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F.2d 440. The Commission concluded its letter to Southwestern by stating, in part:

⁵ The above characterization of this particular letter is taken from the Commission's Index of Record certified to the Court on January 8, 1965.

"Therefore, you are hereby being given an opportunity to amend your petition to deny in accordance with the enclosed Memorandum Opinion and Order in the Missouri-Illinois case (FCC 64-748) which was adopted July 29, 1964. . . . In the event that you do not submit the information in answer to the questions set forth in the enclosed opinion, the Commission will act on the application and the petition to deny as originally filed."

Nowhere in the letter did the Commission indicate that a review of the pleadings as filed had been made or that the allegations of Southwestern had been found wanting. Nothing indicated that the Commission had looked any further than necessary to determine that a "Carroll issue" had been requested. The *KGMO* case dealt with a radio broadcasting station and radio stations are much more dependent upon local advertising accounts than are television broadcasting stations. The questions propounded in the Memorandum Opinion and Order attached to the letter were devoted in large part to a discussion of local revenues. The arguments advanced by Southwestern had, however, been confined almost exclusively to the impact which a grant would have upon its ability to hold existing national and regional advertising accounts.

On October 19, 1964, counsel for Southwestern wrote the Commission with reference to the August 18, 1964, letter and stated that additional information with respect to the K-Six application would not be submitted (R. 337).

On November 19, 1964, the Commission released its Memorandum Opinion and Order denying Southwestern's Petition to Deny and granting the K-Six application (R. 339-342). The Commission found that Southwestern was a party in interest to the application but concluded that it had not met the statutory burden. Commissioner Cox dissented but did not issue a statement.

In granting the application, the Commission said that Southwestern's arguments with respect to the economic injury question "were too generally stated, speculative and not sufficiently related to the conclusions

drawn . . . to enable the Commission to determine whether a *Carroll* issue would be warranted." Likewise, it rejected the programming contentions made by Southwestern, indicating satisfaction with K-Six's explanation that it had, after its application was filed, conducted some programming inquiries. The Commission made no reference to the fact that K-Six was following almost precisely the existing programming of Station KZTV.

With respect to the request of Southwestern that additional information be required of K-Six, the Commission asserted that these were matters raised for the first time on reply and therefore not in compliance with Commission rules; this, despite the fact that Southwestern's request was predicated upon disclosures contained in K-Six's Opposition. The Commission also asserted that Southwestern had advanced no facts in support of the assertion that K-Six was motivated by a desire to protect its competitive position in Corpus Christi rather than to provide a local service to Laredo.

On December 11, 1964, Southwestern filed a Notice of Appeal and a Motion for Stay with this Court. Following oral argument, the Court, by Order dated January 12, 1965, denied the Motion for Stay.

STATUTES INVOLVED

The pertinent parts of the statutes involved are set out in the Appendix to this brief.

STATEMENT OF POINTS

1. The Commission was presented with a substantial and material question of fact whether grant of K-Six's application would result in such economic injury to Southwestern that there would be degradation of programming service in Laredo and it was unlawful for the Commission to grant the application without hearing.

2. The Commission refused to consider the facts of the case before it and sought to impose upon Southwestern a requirement that evidence unrelated to the facts of the case be pleaded and in so doing acted unlawfully because contrary to statute and judicial decision.

3. In the context of this proceeding, the Commission's refusal to request and obtain a full disclosure from K-Six concerning its programming, staffing and revenue plans for the proposed operation was arbitrary and capricious and in violation of statute.

4. The Commission's refusal to designate the K-Six application for hearing to determine whether its programming plans had been formulated with an awareness of the needs of the area to be served in mind was arbitrary and capricious because contrary to existing Commission policies and past Commission decisions.

SUMMARY OF ARGUMENT

By judicial decision the Commission is required to consider the economic impact which a grant of a new broadcast facility will have upon the services of existing stations, *Carroll Broadcasting Company v. Federal Communications Commission, supra*. Southwestern presented allegations of economic and other facts giving rise to a substantial and material question whether grant of the K-Six application would result in degradation of programming service to the public, and the Commission was required by Section 309 (e) of the Communications Act formally to designate the K-Six application for hearing.

The Commission sought to avoid responsibilities which it has by virtue of statute and judicial decision by imposing upon Southwestern a burden of pleading evidence, as opposed to alleging facts, and its action in this regard was unlawful because contrary to Section 309 (e) of the Communications Act. In any event, the information which it requested of Southwestern was, for the most part, not related to the facts of the case before it; to the extents pertinent, the record contained sufficient

data responsive to all of the questions which the Commission raised. When viewed in light of existing policies, the Commission's action in this regard was arbitrary and capricious.

The application of K-Six and its Opposition contained conflicting factual statements in important respects. The Commission's refusal to seek clarification from K-Six was in violation of Section 308 (e) of the Communications Act and *Clarksburg Publishing Co., Inc. v. Federal Communications Commission*, 96 U.S. App. D.C. 211, 225 F.2d 511. Because the Commission's refusal to elicit clarifying information of K-Six deprived Southwestern of important tools needed in weighing the impact of a grant of the K-Six application, the Commission's subsequent denial of Southwestern's Petition to Deny on the basis that sufficient factual allegations had not been made was arbitrary and capricious.

In view of the facts that: (a) K-Six proposed principally a rebroadcast facility in Laredo which would duplicate to a large extent the programming of K-Six's Corpus Christi station; (b) the local live presentations proposed by K-Six almost uniformly were scheduled for periods immediately adjacent to sign-on times when the audience is minimal; (c) insofar as could be determined, no local public service announcements would be broadcast by K-Six; and (d) almost all of the local live programs which K-Six did propose for Laredo had counterparts in its Corpus Christi schedule, it was arbitrary and capricious for the Commission not to designate the application for hearing to determine whether the program schedule was designed to serve the needs of the community of Laredo. *Suburban Broadcasters*, 20 Pike & Fischer R.R. 951, *aff'd.*, *sub. nom.*, *Henry v. Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F.2d 191, *cert. den.*, 371 U.S. 821.

ARGUMENT

I

THE COMMISSION WAS PRESENTED WITH A SUBSTANTIAL AND MATERIAL QUESTION OF FACT CONCERNING THE "CARROLL ISSUE" ALLEGATIONS AND BY STATUTE WAS REQUIRED FORMALLY TO DESIGNATE THE APPLICATION FOR HEARING

A. By Statute and Judicial Decision the Commission Was Required to Consider the Economic Impact of a Grant.

Section 309 (e) of the Communications Act of 1934, 48 Stat. 1085 (1934), as amended, 74 Stat. 889 (1960), 47 U.S.C. §309, provides that if the Commission is presented with a substantial and material question of fact regarding an application before it *or* if for any reason the Commission cannot determine that a grant would serve the public interest, convenience and necessity, it must designate the application for hearing. The pertinent factors to be taken into consideration by the Commission in making the required public interest determination will vary from case to case.

The courts have held that in some cases the impact which a new authorization would have upon existing facilities and consequently upon the public interest must be considered by the Commission in discharging its licensing function.⁶ Commercial broadcast licensees must have adequate financial resources in order to operate in the public interest. Where a grant of an application for a new authorization will result in such a division of revenues in a given market that service to the public will be curtailed or terminated, it is incumbent upon the Commission to deny the application.

In the *Carroll* case, *supra*, the Court cited *Sanders Brothers, supra*, for the proposition that although economic injury to an existing station is

⁶ Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 471; Carroll Broadcasting Co. v. Federal Communications Commission, *supra*.

not a ground for denying an application for a new facility, it may have an important bearing on whether the public interest would be served by a grant. The Court said:

"[I]t seems to us, the question whether a station makes \$5,000, or \$10,000, or \$50,000 is a matter in which the public has no interest so long as service is not adversely affected; service may well be improved by competition. *But, if the situation in a given area is such that available revenue will not support good service in more than one station, the public interest may well be in the licensing of one rather than two stations. To license two stations where there is revenue for only one may result in no good service at all.* So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service. At that point the element of injury ceases to be a matter of purely private concern." [103 U.S. App. D.C. at 349, *Italics added.*]

The Court recognized that it would not be in every case that economic considerations would have an effect upon the public interest. The Court did, however, assert that where the relationship between competition and the public interest does exist, an appropriate issue must be designated:

"We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof and, if the evidence is substantial (*i.e.*, if the protestant does not fail entirely to meet his burden), should make a finding or findings." [103 U.S. App. D.C. at 349.]

The Court most recently reaffirmed the policies announced in the *Sanders Brothers* and *Carroll* cases in *KGMO Radio-Television, Inc. v. Federal Communications Commission, supra*.

If, therefore, the Commission was presented a substantial or material question of fact as to whether the Laredo market could sustain two competitive television broadcast facilities without detriment to the public

interest, it was required to designate the K-Six application for hearing in order to permit evidentiary proof on the point. Southwestern did supply the Commission with sufficient factual data to satisfy the statutory standard and the policies enunciated by this Court in the *Carroll* case, *supra*.

B. The Pleadings Filed Disclose That Grant Would Result in Degradation of Programming Service

The pleadings filed in connection with the K-Six application total well over 200 pages, most of which are devoted to the economic injury question. Southwestern presented a number of facts, supported by affidavit as required by Section 309 (d) of the Communications Act, *supra*, the most salient of which were the following:

The Laredo Economy: Laredo is located in an economically depressed area; it receives federal assistance from the Area Redevelopment Administration (R. 112, 284-285). Approximately one-half of Laredo families have annual incomes of less than \$2,500 (R. 111). Unemployment varies seasonally but generally the rate is twice the national average; at the time Southwestern's Petition to Deny was filed the unemployment rate was 12.6 percent (R. 112). Retail sales in Laredo and in Webb County are substantially below those of comparable markets in the State of Texas (R. 120). While the economy in the area is experiencing some growth by virtue of the federal assistance, the overall picture is not one of economic health (R. 112, 122).

The Laredo Chamber of Commerce lists only 509 retail establishments in the community (R. 121). The principal source of retail trade is soft goods, small appliances, cosmetics and related items, cameras, and other items which can be carried easily by hand (R. 119-120).⁷ The majority of the retail stores dealing in these items do not advertise through any of the local media (R. 119-122). The advertising that is done by these concerns is usually placed on

⁷ Evidence of this is found in the fact that Webb County in which Laredo is located is the only market in the United States where retail expenditures for wearing apparel exceed the retail expenditures for automobiles on a consistent basis (R. 119).

one of the Mexican facilities at the low rates as described below (R. 120).

Competitive Media: While KGNS-TV is the only United States television station in the immediate area, there are two VHF television stations operating in Nuevo-Laredo, Mexico, which serve Laredo. The stations actively solicit advertising from Laredo business concerns at rates substantially lower than those of KGNS-TV. There are two radio stations located in Laredo, one of which is owned by Southwestern. There are six radio stations operating in Nuevo-Laredo which sell time in Laredo, sometimes at rates as low as fifteen cents per spot announcement. There are a number of newspapers and outdoor advertising concerns which solicit advertising in the community and there is a viable CATV system, which serves more than 2,000 homes in the community (R. 112-117).

KGNS-TV's Financial Position: KGNS-TV has operated, at best, with small profits when compared with most other television stations in the country.⁸ For the fiscal year ending February 28, 1959, KGNS-TV had an operating loss of \$9,849.23 on revenues of \$103,664.70. For the fiscal year ending February 29, 1960, the net operating profit was \$287.73 on revenues of \$225,717.32. In the 1960-61 fiscal year, the operating profit was \$8,919.96 on revenues of \$241,408.19, and in 1961-62, the operating profit fell to \$7,874.76 although revenues increased to \$250,148.10. The company's fiscal year was changed in 1962 and for the period beginning March 1, 1962, and ending June 30, 1962, KGNS-TV showed a profit of \$6,890.84 on revenues of \$85,049.51. A big improvement was made in the fiscal year ending June 30, 1963, owing principally to a reduction in expenses; though revenues fell to \$232,414.70, the station showed a profit of \$19,526.97. (R. 117-118).

Sources of Revenues: KGNS-TV relies to a large extent on national and regional advertising revenues (R. 123). At the time the K-Six application was filed,

⁸ TV Broadcast Financial Data - 1963, released July 23, 1964 (FCC 54732). Table 5 of the Report discloses that of 455 stations for which information was supplied only 108 had losses or profits less than \$25,000. On the other hand, 124 stations reported profits of over \$600,000.

every national and regional advertiser using the facilities of KGNS-TV also advertised on one or more of the Corpus Christi television stations (R. 102). At that time KGNS-TV had national and regional advertising accounts outstanding which totalled almost \$60,000.00 (R. 123). Southwestern alleged, on the basis of studies conducted, that it was then obtaining substantially the maximum revenues available (R. 118-122). It has faced difficulties owing to the fact that Laredo is one of the smallest television markets in the country (R. 100, 118, 287-288).

Operating Expenditures: Because of its financial situation Southwestern employs, and K-Six conceded, the minimum staff possible to permit it to deliver the service it presently provides (R. 267). The only area in which it reasonably could be expected to achieve further operating economies is with respect to non-revenue producing public service and local live programming (R. 132-134). Southwestern described all of its current local live presentations in its Petition to Deny (R. 129-132). It stated in its Reply, in answer to questions raised by K-Six: "Southwestern cannot, and does not believe that the *Carroll* case demands that it assert which public service program or announcement would be the first 'to go'. Too many variables are involved in reaching such a decision. Southwestern has shown that if the K-Six application is granted it will lose irreplaceable revenues; that its expenses in producing live programming are greater than for other programs and that it would turn to revenue producing or less expensive items in an effort to offset losses. Nothing more is required" (R. 299-300).

The "Substitution" Question: Any local live or public service programming which KGNS-TV would be forced to delete (assuming that the grant would not mean the station's demise) would not be compensated for by K-Six's proposed service (R. 301-303). Once a television reception service is provided to a community, the next priority in allocations is the provision of local service.⁹ K-Six proposes principally a rebroadcast facility (R. 62). With very

⁹ Sixth Report on Television Allocations, 1 Pike & Fischer R.R. (Part 3), 96:599 at 620.

few exceptions, its local presentations are scheduled in periods adjacent to "sign-on" times (R. 25-31). There is no indication that it will even present non-commercial public service announcements, other than those rebroadcast from Corpus Christi (R. 267, 307). At the time the application was filed, the commencement of operations of a third VHF commercial television station was imminent (R. 276-277). K-Six vigorously opposed the rule making proposal to assign the third channel to Corpus Christi, alleging principally that the market would not support three stations.¹⁰ K-Six's President asserted that he thought the Laredo application would help KZTV hold national spot business by offering additional coverage (R. 311). From these facts, Southwestern concluded that K-Six was motivated by a desire to protect its position in Corpus Christi, not to provide local service to Laredo.

Lost Revenues: Because of its belief that K-Six would not sell advertising time in Laredo, Southwestern did not allege that it would lose substantial local revenues. Its argument was based on the fact that all of its national and regional advertisers also advertised on Corpus Christi television. K-Six's ability to offer two markets at a lower cost than if each were purchased separately, would result in substantial losses to KGNS-TV.

K-Six's Assertions: Finally, the record discloses that on at least two occasions, K-Six declared that Laredo cannot presently support two competitive television stations (R. 62, 311).

C. The Commission Was Under a Statutory Duty to Designate the Application for Hearing

The pleading requirements with respect to pre-grant petitions to deny are derived from statute. The petitioner must plead facts showing that it is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest.¹¹ If a substantial and

¹⁰ Television Assignments at Corpus Christi, Texas, 18 Pike & Fischer R.R. 1800.

¹¹ Section 309 (d) (1) of the Communications Act of 1934, supra.

material question of fact exists, the Commission is required to designate the application for hearing.¹² For purposes of the relevant statutory provisions a " 'material question of fact' is a question of fact which is material to determination of the question whether the public interest, convenience, or necessity would be served by the granting of the application with respect to which such question is raised."¹³

The question whether a market will support an additional broadcast facility without detriment to the public is one material to whether the public interest would be served by grant of an application.¹⁴ Southwestern clearly met the statutory burden and the Commission had a duty to designate the K-Six application for hearing. Its failure to do so was unlawful.

II

THE COMMISSION MAY NOT LAWFULLY AVOID
A DUTY IMPOSED UPON IT BY STATUTE AND
JUDICIAL DECISION BY ESTABLISHING PLEADING
REQUIREMENTS UNRELATED TO THE FACTS OF
THE CASE BEFORE IT AND WHICH ARE INCAPABLE
OF BEING MET PRIOR TO PREPARATION FOR
HEARING BY REQUIRING THAT EVIDENCE RATHER
THAN ALLEGATIONS OF FACT BE PLEADED

A. The KGMO Proceeding

Before the pleading process in connection with the K-Six application had been concluded, this Court rendered its decision in *KGMO Radio-Television, Inc. v. Federal Communications Commission*, *supra*. KGMO had challenged the grant of an application for a new radio station in the

¹² Section 309 (e) of the Communications Act of 1934, *supra*.

¹³ H.R. Rep. No. 1800, 86th Cong., 2d Sess. (1960).

¹⁴ *Federal Communications Commission v. Sanders Brothers Radio Station*, *supra*; *Carroll Broadcasting Co. v. Federal Communications Commission*, *supra*; *KGMO Radio-Television, Inc. v. Federal Communications Commission*, *supra*.

community which it served on "Carroll issue" grounds. KGMO had not, however, followed the pre-grant procedures established by Commission rules and by statute, but rather made its opposition known for the first time by submitting a Petition for Reconsideration after grant of the application. The Commission disposed of the Petition for Reconsideration, not on procedural grounds, but because, it said, KGMO had failed to make its case. In doing so, the Commission indicated that the result might have been different had pre-grant procedures been followed: "Although, in this case, the petition has been filed pursuant to Section 405 of the Act, the petitioner is required to allege facts at least as well as under Section 309 (d) . . ."¹⁵ Commissioner Cox dissented, expressing concern that the majority might be requiring the petitioner to plead evidence as opposed to alleging facts, *infra*, pp. 22-23.

On appeal the Court treated the matter, insofar as the decision is herein pertinent, as though Section 309 standards governed. The Court ruled that the Commission could require more information than KGMO presented, but because of past treatment of "Carroll issue" requests, the Commission was required to give KGMO notice in this regard. The Court remanded the case to the Commission with instructions to permit KGMO to supplement its Petition for Reconsideration, unless it chose to dispose of the proceeding on other grounds.

KGMO had made only very generalized allegations with respect to the "Carroll issue". Its Petition for Reconsideration contained information concerning the economy of the area but only to the extent of supplying information with respect to unemployment. KGMO also set forth the existing services and competitive media in the area and discussed briefly its financial situation. KGMO assumed that the proposed station would obtain fifteen percent of its revenues and concluded, therefore, that it would have to curtail or discontinue services which it had been providing

¹⁵ Missouri-Illinois Broadcasting, Inc., 1 Pike & Fischer R.R. 2d at 3, rev'd, KGMO Radio-Television, Inc. v. Federal Communications Commission, supra.

to public service organizations. The Commission concluded that KGMO's allegations were too generally stated and not sufficiently related to the conclusions drawn to justify reconsideration of its prior grant and designation of the application for hearing.

Commissioner Cox dissented and submitted an opinion, the substance of which was that the Commission's denial of the KGMO petition was inconsistent with prior determinations in this regard. In the past the Commission had designated a number of applications for hearing on "Carroll issues" on the basis of very broad and general allegations. In *Geoffrey A. Lapping*, 25 Pike & Fischer R.R. 919, the Commission ordered a hearing on a "Carroll issue" on allegations that the community was too small to support two radio stations; that authorization of a second station would be contrary to the public interest since radio service would be degraded; that an earlier licensee of the existing station had lost money; that the existing station offers sustaining and public service programming; and that if a second station were authorized "it is most likely that both facilities would fail or at least all public service, non-commercial programming would have to be deleted."

The Commission also designated an application for hearing on a "Carroll issue" in *Bigbee Broadcasting Company*, 24 Pike & Fischer R.R. 497. The only allegations were that the community's population was less than 8,000; that there was evidence of substandard income; that the area's population had declined; that there was existing competition; and that the profits of the existing station had been nominal.

The Commission also designated applications for hearing on the basis of similar allegations in *Haggard and Rogers*, 24 Pike & Fischer R.R. 670; *John Self*, 24 Pike & Fischer R.R. 1177; *Rhineland Television Cable Corp.*, 24 Pike & Fischer R.R. 1181; and *Brush Broadcasting Company*, (FCC 63-52, 1963).

In disposing of the KGMO case, however, the Commission said:

"The petitioner has only assumed that the proposed new operation might draw a portion of its revenues from the KGMO current revenues, thereby reducing KGMO's total income, but has not alleged facts tending to show the extent to which that might occur. KGMO has not shown the amount of total annual retail sales in the area over a representative number of years, nor has it alleged that retail sales have shown a decreasing, increasing or stagnant pattern. The petitioner has not set forth the number of businesses or indicated the total advertising revenue available potentially in Cape Girardeau and the general area, nor the amount of advertising revenue actually earned from the area. No information was submitted as to whether there are businesses that could but that do not now advertise on radio. Furthermore, KGMO has not alleged that it has actual knowledge of the extent to which specific advertisers on KGMO might shift their advertising to the new station. Nor has it alleged that no other revenue is available to replace any business which may be lost by KGMO due to this grant although, generally speaking, a new broadcast station generates some new business. In fact, KGMO has alleged no facts to support its assumption that it would suffer a decline in revenues due specifically to this grant. These failures to allege specific material and relevant facts take on added significance when viewed in the light of successful operation in the area of other broadcast stations, both standard and television." ¹⁶

It was not, therefore, surprising that this Court held, on appeal, that if the Commission wished to consider the Petition for Reconsideration, it could require more information than KGMO gave but it was under some obligation to give notice of that fact.

B. The Commission Has Taken the KGMO Case as Permitting It to Require Petitioners to Plead Evidence Contrary to Law

The *KGMO* case, *supra*, stands for the proposition that since the Commission in the past had designated applications for hearing on "Carroll issues" on the basis of minimal showings, it was arbitrary and

¹⁶ Id. at 3-4.

capricious for it, without giving prior notice, to expect more of KGMO than of past petitioners.

The Commission reads the case as meaning that it can set forth a specific set of questions which must be answered by all "Carroll" petitioners (irrespective of the facts of the particular case, and entirely apart from the plain language of Section 309 of the Act), and in the absence of answers to such questions, dismiss the Petition to Deny.

On remand of *KGMO*, the Commission chose not to dispose of the case on procedural grounds, but rather afforded KGMO an opportunity to supplement the showing which it previously had made. The Memorandum Opinion and Order of the Commission¹⁷ sets forth twelve questions (eighteen if subparts are counted) which it said "should be fully answered" by KGMO. The Commission said:

"In the event that KGMO does not submit the information specified in paragraph 6, the Commission will dismiss the KGMO petition for reconsideration and dissolve the outstanding stay of the construction permit of Missouri-Illinois Broadcasting Co."

The Commission then, insofar as Southwestern can determine, addressed a form letter to every petitioner which had a "Carroll issue" pleading then pending, to which it attached the Order issued on remand of *KGMO*. The form letter, received by Southwestern, states:

"Reference is made to your petition to deny the above-numbered application for a construction permit for a new TV broadcast facility on the grounds that the area cannot support another station without a net loss or degradation of program service to the area.

"The United States Court of Appeals in the case of *KGMO Radio-Television, Inc. v. F.C.C.*, 2 R.R. 2d 2057 (1964), affirmed the principle set forth in the case of *Carroll Broadcasting Company v. F.C.C.*, 258 F. 2d 440 (1958) to the extent that the Commission may inquire into the question whether the economic effect of a second license in the area would be to damage or

¹⁷ Missouri-Illinois Broadcasting, Inc., 3 Pike & Fischer R.R. 2d 232.

destroy service to an extent inconsistent with the public interest. However, at the time the Commission granted the application that was considered by the Court, it set forth illustrations of the type of additional information that must be submitted in support of a request for an economic issue. *Missouri-Illinois Broadcasting Co.*, 1 R.R. 2d 1 (1963). The Court stated that the Commission could require the additional information.¹⁸ However, since the petitioner did not have notice of the additional pleading requirements necessary to support the specification of an economic issue the Court stated that, unless the KGMO matter was decided on other grounds, the Commission should permit the petitioner to amend and amplify its allegations in support of the petition.

"The Commission, in the enclosed Memorandum Opinion and Order, adopted July 29, 1964, set forth, on Pages 3 and 4 thereof, the questions that must be answered to enable it to determine if you have alleged specific and material questions of fact that would require an evidentiary hearing on the economic issue.

"Therefore, you are hereby being given an opportunity to amend your petition to deny in accordance with the enclosed Memorandum Opinion and Order in the *Missouri-Illinois* case (FCC 64-748) which was adopted July 29, 1964. The additional information that you may desire to submit in support of your request for an economic issue must be on file within sixty (60) days from the date of this letter. A copy of this data will be furnished to the applicant who will then have fifteen (15) days from receipt thereof to file opposition data. In the event that you do not submit the information in answer to the questions set forth in the enclosed opinion, the Commission will act on the application and the petition to deny as originally filed" (R. 335-336).

In dissenting from the Commission's original treatment of KGMO's Petition for Reconsideration, Commissioner Cox expressed concern that the generalized statements which the majority made in its Memorandum

¹⁸ The Court did not say that the Commission could require "the" information; rather, it said, "We think it is within the Commission's authority to require more information than appellant gave."

Opinion and Order might be taken as requiring that a petitioner plead evidence. He said: "While the majority denies that it intends to hold that a petitioner must plead its evidence, it seems to me to come perilously close to imposing such a requirement — though it has never done so heretofore."¹⁹ Commissioner Cox was also concerned that the Commission might be imposing requirements so strict that, in effect, it could avoid the duty which the courts and the statutes have imposed upon it to consider, in appropriate cases, the economic impact of a grant of an application for a new facility. In this regard, he said:

"I am not unaware of the danger that an existing station might be tempted to try to delay the advent of a competing station by invoking the doctrine of the Carroll case. This justifies us in requiring one who alleges that competition will impair the public interest, rather than serve it, to allege sufficient facts to make it appear likely that the dangers he asserts are real. It does not permit us, in my opinion, to set requirements so rigid that they are not likely to be capable of achievement prior to actual preparation for trial of the case. I do not believe we can avoid a duty which the court says Congress has imposed upon us under the guise of requiring unreasonable precision in pleading."²⁰

If the generalized language of the initial *Missouri-Illinois* Order comes perilously close to requiring that evidence be pleaded, the requirements set forth in the Commission's letter to Southwestern go beyond permissible limits and the Commission's action in this regard is unlawful.

In *Federal Broadcasting System v. Federal Communications Commission*, 96 U.S. App. D.C. 260, 225 F.2d 560, *cert. den.*, 350 U.S. 923, the Court said:

¹⁹ Missouri-Illinois Broadcasting, Inc., 1 Pike & Fischer R.R. 2d at 9-10 (dissenting opinion).

²⁰ Id. at 7 (dissenting opinion).

"But neither are we to measure the requirement of Section 309 (c) by the technicalities of pleading formerly applicable in civil litigation. What is required is merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding." (96 U.S. App. D.C. at 263, 225 F.2d at 563).

The *Federal Broadcasting* case was decided prior to the 1960 amendments to Section 309 of the Communications Act. The 1960 amendments were designed to remedy shortcomings which had arisen by virtue of the protest procedure. Most significantly, the 1960 amendments provided that protestants would be required to make their objections known to the Commission prior to the grant of the application involved. The amendments also required that information submitted be supported by affidavit of a person having personal knowledge of the facts contained in the petition.

Nowhere in the legislative history is there evidence that the Congress intended to go so far as to require that a petitioner plead evidence or that substantially more by way of factual allegations would be required than had been the case in the past. The amendments were designed to provide for a pre-grant rather than a post-grant opposition and to require something more than facts submitted only upon information and belief.

**C. The Commission Refused to Examine the Pleadings
Before It and Had It Done So It Would Have Found
That a Substantial and Material Question of Fact
Existed**

The Commission is under a statutory duty to examine the facts surrounding each application before it to determine if the public interest would be served by a grant. It may not avoid this duty by establishing pleading requirements unrelated to the facts before it. In this regard,

Commissioner Loevinger said in a concurring opinion in the original *Missouri-Illinois* case:

"Facts vary in their significance both with respect to the circumstantial setting in which they are found and with respect to the legal frame of reference in which they are set. Factual situations cannot be simply or mechanically compared without an intervening abstraction of categories or principles, and so cases are not and cannot be controlled or decided by simply [sic] analogy between one set of facts and another. Loevinger, *An Introduction to Legal Logic*, 27 Ind LJ 471 (1952). . . .²¹ Turning to the situation presented by the instant case, the Commission, as I understand it, here holds that in this procedural situation the petitioner has not pleaded facts sufficient to require setting aside the Commission's Order, reconsidering the decision, reopening the proceeding, and ordering a hearing. . . ."

The facts set forth in the pleadings submitted established beyond doubt that a significant question exists as to whether a grant of the K-Six application would serve the public interest. The facts were buttressed by the statements made by K-Six's president and in the K-Six application that Laredo could not at this time support a second competitive television facility (R. 62, 311).

In addition, many of the questions which the Commission purportedly put to Southwestern were not immediately relevant to the claims which Southwestern had made. The questions generally applied to a radio broadcasting situation, the programming and economics of which are entirely different from television broadcasting. In large part the questions were designed to determine the impact which a grant would have upon Southwestern's ability to obtain local revenues. Southwestern's petition did not, however, concern itself with lost local revenues. Because of the rebroadcasting arrangement proposed by K-Six and the

²¹ Missouri-Illinois Broadcasting, Inc., 1 Pike & Fischer R.R. 2d at 13 (concurring opinion), rev'd. KGMO Radio-Television, Inc. v. Federal Communications Commission, supra.

resultant leverage which it would have with respect to national and regional advertisers, Southwestern argued that the impact would be experienced in other than local revenues.

And, to a significant extent, the Commission would have found, had it elected to analyze the various pleadings submitted, that most of the information which it assertedly was calling for was already in the record, or at least an explanation was provided as to why the information was not supplied. Thus, the Commission asked for information concerning retail sales. A complete answer is in the record at page 176. The Commission asked what the total number of businesses in the community was and the answer is at page 121 of the record.²² The Commission inquired about total advertising revenue potential in the *community* and the *area* and to the extent the question is pertinent to this particular case, information is found at pages 117-125 of the record. The Commission asked what is the amount of *local advertising revenue* earned in the community and the area, but the question is hardly pertinent to the pleadings submitted by Southwestern although the information is, in any event, in the files of the Commission. The Commission wished to have revenue, expense, and employee figures for a three year period and much of this information is contained in the record at pages 117-118 and 127-129, and again, the information is already in the Commission's files. The Commission also asked "How many of the existing businesses in the *community and the area* do not now advertise on the radio?" While the question is not directly pertinent to Southwestern's contentions, some indication in this regard is given at pages 119-121 of the record.

The Commission also required that the letter's respondent "State in detail, the specific advertisers that would shift their advertising to the proposed station", and then asked, "How many advertisers will split their advertising time between the existing station or stations and the proposed

²² The Commission also wanted to know the number of businesses in the "area". Laredo is the only urban area in the entire KGNS-TV coverage area.

station?" The question is, in large part, unrelated to the facts of this case since the new station would not seek advertising accounts. Southwestern's concern was that national advertisers would drop their accounts with KGNS-TV because of the Corpus Christi rebroadcast arrangement. In any event, because of the lack of information concerning K-Six's plans, it would have been impossible to supply the information with the degree of specificity which the Commission would require. Some information concerning this point is contained at pages 123-124 of the record. Important, however, is the fact that it is altogether unreasonable for the Commission even to propound such a question at this point since the possible future competitor could use the information thus obtained to great advantage.

The Commission requested information as to the extent of existing competing advertising media in the area and complete data is contained at pages 112-117 of the record. The Commission also asked questions concerning what effects a grant would have on programming service available to the public. Information concerning KGNS-TV's programming is in the record at pages 125-126 and 128-133, and, too, KGNS-TV asserted:

"Southwestern illustrated in its Petition to Deny that a grant of the subject application would result in severe financial losses to KGNS-TV. Since broadcasters must recognize some return on capital investment, it follows that public service and sustaining type programming will be affected. Southwestern cannot, and does not believe that the *Carroll* case demands that it assert which public service program or announcement would be the first 'to go'. *Too many variables are involved in reaching such a decision.* Southwestern has shown that if the K-Six application is granted it will lose irreplaceable revenues; that its expenses in producing live programming are greater than for other programs and that it would turn to revenue producing or less expensive items in an effort to offset losses. Nothing more is required." (Italics added. R. 299-300.)

Additional programming information is available in the renewal applications which have been filed with the Commission. Information, to the extent it could be obtained, concerning programming costs is included at page 132 of the record.²³ In any event, it is submitted that it would be impossible for the Commission to make, on the basis of the pleadings filed, a determination as to whether there would be degradation in programming service rather than a substitution of any service which might be lost.

A separate question called for information concerning possible substitution of lost programming. The considerations discussed above are applicable, and the limitations of K-Six's proposed programming are discussed at several points in the record, e.g., pages 135-136 and 301-303.

The Commission asked whether substantial changes in programming would have to be made. This question is answered in detail at pages 125-126 and 132-133 of the record.

The final question asked by the Commission was:

"Set forth any other information which is sufficiently related to the economics of broadcasting, including the specific relationship between any assumed losses in revenue to the withdrawal of particular programs or program services in support of the question raised in petition to deny concerning the inability of the area to support another broadcast station without loss or degradation of program service to the area."

A cursory examination of the various pleadings filed indicates clearly that the Commission had been provided with far more pertinent information than would have been obtained only if the specific questions

²³ KGNS-TV is a small operation and does not maintain exact "flow charts" and similar data which might be maintained by a large television station and which would enable it precisely to set forth the cost of each program.

propounded by it had been answered, and all of it relevant to the question which it refused adequately to consider — whether a grant of the application would result in degradation of programming in the market.

**D. The Commission's Treatment of the Southwestern
Petition Was Arbitrary and Capricious When Viewed
In Light of Existing Policies**

The Commission's summary dismissal of Southwestern's pleading and its apparent plan for future treatment of "Carroll issue" requests is made all the more arbitrary when compared with practices it follows in other areas of licensing. At the present time the Commission is withholding grants of microwave authorizations designed to serve community antenna television systems unless the carriers accept grants subject to elaborate conditions designed to protect television broadcast operations.²⁴

Prior to adopting that procedure the Commission, on a case-to-case basis, protected local television stations from CATV operations, and it cannot be subject to question that CATV has substantially less impact upon an existing operation than does the licensing of a competitive broadcast facility. In *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359, this Court sustained the Commission's action in one such case. The *Carter Mountain* case involved a station located in Riverton, Wyoming, which, from the standpoint of television homes, is in a position superior to KGNS-TV (R. 288).

Southwestern does not contend that the Commission's practices in CATV matters are governing in this situation. The economic threat of CATV is such to give rise to concern that there might be a complete deletion of television service for substantial populations. On the other hand, the Commission is also concerned in this regard that the economic impact

²⁴ Notice of Proposed Rule Making, Docket No. 15233 (FCC 26-1128) released November 13, 1963, 28 FR 13789.

might be such as to cause a degradation in the programming of local television stations. While *Carter Mountain* was predicated upon the threatened "demise" of the local television station, the Commission is now concerned with whether CATV operations might affect a station's programming, Notice of Proposed Rule Making, Docket No. 15233, *supra*.

To a large extent, however, the CATV analogy is pertinent. K-Six proposes substantially a rebroadcast facility and will give little consideration to local programming. The local programming scheduled is, for the most part, to be immediately adjacent to sign-on periods. Insofar as can be determined, no local noncommercial public service announcements will be transmitted. The threat of a lost local service is as real in this situation as in the CATV situations. Here, of course, there is no danger that the K-Six operation will result in such a division of revenues that neither station can survive. Indeed, K-Six has made it quite clear that the Laredo operation will survive by virtue of the Corpus Christi operation which K-Six has asserted has operated at substantial profits for "some time" (R. 195).

It is submitted, therefore, that the requirements which the Commission sought to impose upon Southwestern exceeded its statutory authority and that in the context of this proceeding, its action in dismissing the petition to deny was arbitrary and capricious.

III.

THE COMMISSION'S ACTION IN GRANTING THE APPLICATION WITHOUT REQUIRING ADDITIONAL INFORMATION OF K-SIX WAS UNLAWFUL BECAUSE CONTRARY TO STATUTE AND IN THE CONTEXT OF THIS PROCEEDING, ARBITRARY AND CAPRICIOUS

The requirements of Section 308 (b) of the Communications Act of 1934, 48 Stat. 1084, as amended, 76 Stat. 63, are clear; an applicant must submit all data required by the Commission. In addition, the Commission has the discretion, by virtue of the statute, to require the disclosure of additional information in order to permit it to make the

determination required by law -- whether grant of the application would be in the public interest.

K-Six asserted two important facts inconsistently in its application and the pleading filed after the application was tendered to the Commission. In most situations this would be no great problem, but in the context of this case, it is crucial. The Commission was asked to resolve the question whether, owing to economic limitations of the market to be served, a grant would be in the public interest. The financial and programming aspects of the K-Six application were, therefore, of particular importance.

K-Six, in its application, indicated that it would recognize no revenues during its first year of operation (R. 20); K-Six's president had stated that he did not intend to "sell time" in Laredo (R. 311); and K-Six proposed no salesmen on its staff (R. 34). Southwestern relied on these facts in formulating its Petition to Deny.

In its Opposition, however, K-Six modified the earlier information to a significant extent. It asserted that it did plan to sell time in Laredo (R. 157) and immediately to assess additional charges on KZTV advertisers receiving the added coverage in Laredo (R. 261). K-Six did not, however, amend its application to reflect revenues.

K-Six's Opposition also contained allegations respecting Southwestern's operation. Among other things, it was asserted:

"If KGNS-TV dropped every sustaining program from its schedule, it still could not eliminate a single person from its 15-man staff, *a minimum staff for a station presenting local commercial and news programming.*" (*Italics added.* R. 267.)

On the basis of these factors, Southwestern urged the Commission to demand that K-Six define the exact nature of its proposal. It also asked the Commission to determine whether public service announcements for Laredo would be carried in view of the assertions made with respect to Southwestern's staff and if so, whether K-Six's staffing plans were

adequate (R. 308-309). K-Six proposed the services of only seven employees (R. 34). In the absence of such information, Southwestern could not assay the impact of a grant (R. 281) and the Commission certainly could not begin to determine whether a grant would result in substitution, rather than degradation of programming.

The Commission's refusal to do so was in violation of Section 308 of the Act which, at a minimum in the context of this case, requires an estimate of first year's revenues. In view of the fact that the Commission subsequently dismissed Southwestern's petition owing, at least in part, to Southwestern's alleged failure to provide information concerning *local* revenues, its action in this respect was arbitrary and capricious. Its failure to seek clarification from K-Six deprived Southwestern of important tools to be used in determining the economic impact of a grant. The K-Six application and Opposition left many questions unanswered and the Commission was under an obligation to explore all relevant factors.²⁵

IV.

THE COMMISSION'S FAILURE TO DESIGNATE THE APPLICATION FOR HEARING ON A PROGRAMMING ISSUE WAS UNLAWFUL BECAUSE ARBITRARY AND CAPRICIOUS AND CONTRARY TO PRIOR DECISIONS AND EXISTING COMMISSION POLICIES

In its application K-Six gave no indication that it had taken any steps whatsoever to determine the programming needs of the community of Laredo and that its schedule was formulated with those needs in mind. The programming information which was submitted disclosed obvious deficiencies in areas in which the Commission, in the past, had expressed concern. In its *Report and Statement of Policy Re: Commission En Banc Inquiry*, 20 R.R. 1901, the Commission asserted:

²⁵ See, Clarksburg Publishing Company v. Federal Communications Commission, 96 U.S. App. D.C. 211, 225 F.2d 511.

"In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such needs and interests on an equitable basis. Particular areas of interest and types of appropriate service may, of course, differ from community to community, and from time to time. However, the Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests." [At Page 1913].

K-Six, in large part, proposed only to rebroadcast the programming of its station KZTV in Corpus Christi, Texas. The local live presentations which it did propose were scheduled for periods immediately adjacent to "sign-on" times (when audiences are at the lowest levels) with a few exceptions on Saturdays. No indication was given even that it would carry noncommercial spot announcements for Laredo organizations and disclosures made by it later indicate that it will not do so.

Because of these facts, Southwestern in its Petition to Deny urged that in designating the application for hearing, the Commission include a programming, or "Suburban", issue,²⁶ to determine what efforts K-Six had made to determine local need before it filed.

In its Opposition, K-Six asserted that it had not included information concerning programming studies because the Commission's application form does not call for such information. It proceeded to assert that its principals had long been interested in the Laredo area and had frequently visited the community. It also said that after the Petition to

²⁶ Suburban Broadcasters, 20 Pike & Fischer R.R. 951, aff'd., sub. nom., Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191, cert. den., 371 U.S. 821.

Deny had been filed it had made community "contacts" which confirmed the fact that its schedules were designed to meet Laredo's needs. K-Six included a lengthy description of the history of its formulation of one particular live program which it included on its schedule (R. 190-193). It omitted the fact, however, that a program by the same title then appeared on the programming schedule of Station KZTV. In fact, with few exceptions, the local live programs scheduled for Laredo have virtual counterparts in the programming schedule of KZTV. It assumed, from all appearances, that the same programming provided by its Corpus Christi station was suited to Laredo; basically the same defect which had proved fatal for the applicant in *Suburban, supra*. And, *Suburban* had been entitled to a presumption of "need" because it proposed a first FM transmission service.

Therefore, irrespective of the information submitted by K-Six, there obviously existed significant questions as to how its proposed program schedule had been formulated. In view of the unique scheduling of live presentations and lack of local public service announcements, a question existed whether the schedule was designed to meet the needs of the community of Laredo.

Southwestern does not contend that the Commission was required to make value judgments with respect to the program schedule; only that it was arbitrary and capricious for the Commission to ignore the substantial questions which did exist with respect to K-Six's proposed programming, in view of past pronouncements in this regard, *e.g., Don L. Huber, 22 Pike & Fischer R.R. 954; Kent-Revena Broadcasting Co., 22 Pike & Fischer R.R. 230; Elbert H. Dean, 22 Pike & Fischer R.R. 141; Frederick County Broadcasters, 22 Pike & Fischer R.R. 582 d; Lindsay Broadcasting Co., 22 Pike & Fischer R.R. 805; and Report and Statement of Policy Re: Commission En Banc Inquiry, supra.*

CONCLUSION

For the foregoing reasons, the decision of the Federal Communications Commission of November 18, 1964, must be reversed and this case remanded to the Commission with instructions that a hearing be held on the allegations made by Southwestern in its Petition to Deny and related pleading.

Respectfully submitted,

ANDREW G. HALEY

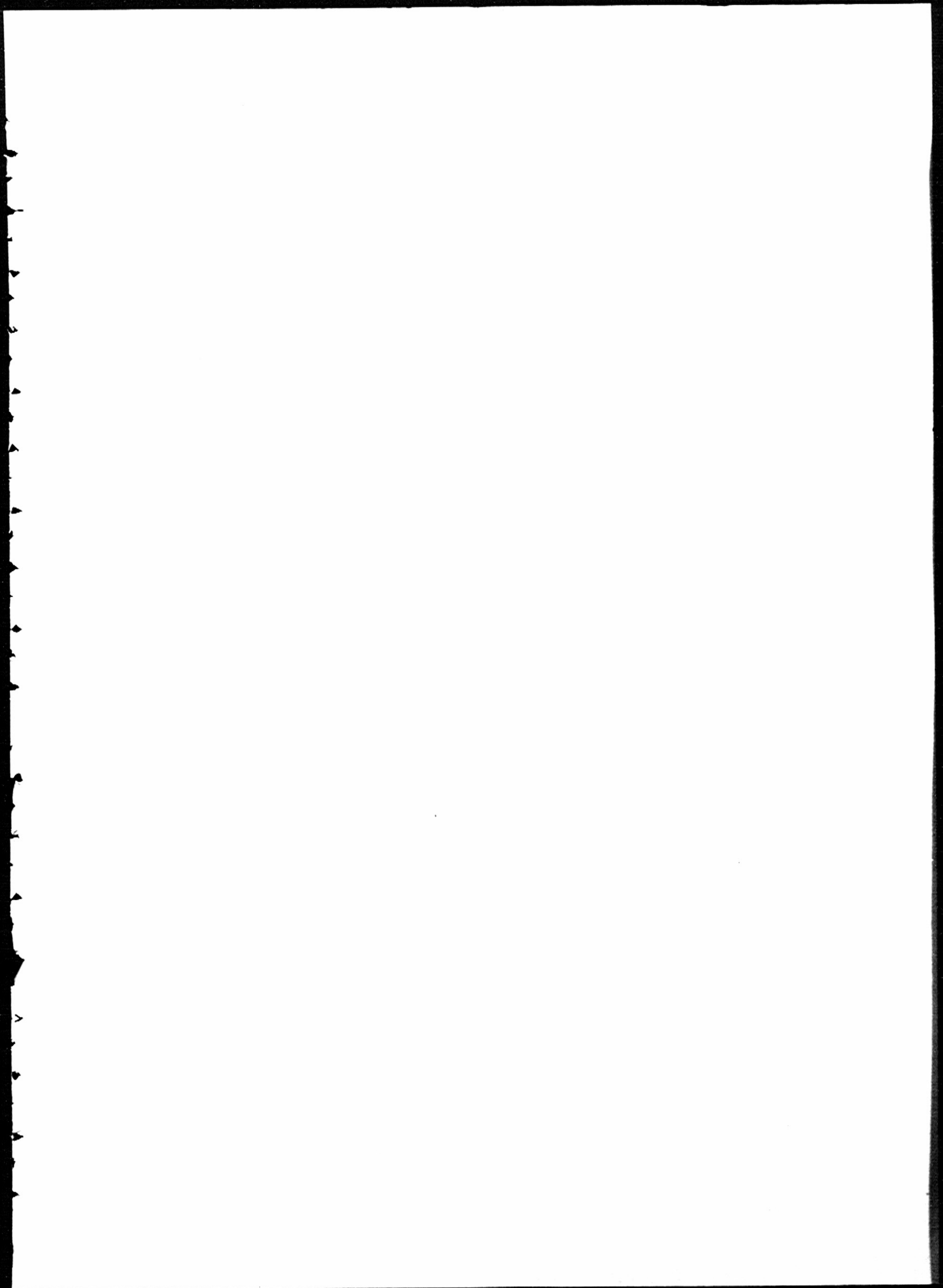
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APPENDIX

COMMUNICATIONS ACT OF 1934, AS AMENDED:

Section 308, 48 Stat. 1084 (1934), as amended,
76 Stat. 63 (1962), 47 U.S.C. §308:

* * *

"(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee."

* * *

Section 309, 48 Stat. 1085 (1934), as amended,
74 Stat. 889 (1960), 47 U.S.C. §309:

"(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

"(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

"(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

"(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such

action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission."

* * *

Section 402, 48 Stat. 926 (1934), as amended,
72 Stat. 945 (1958), 47 U.S.C. §402:

* * *

"(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

"(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

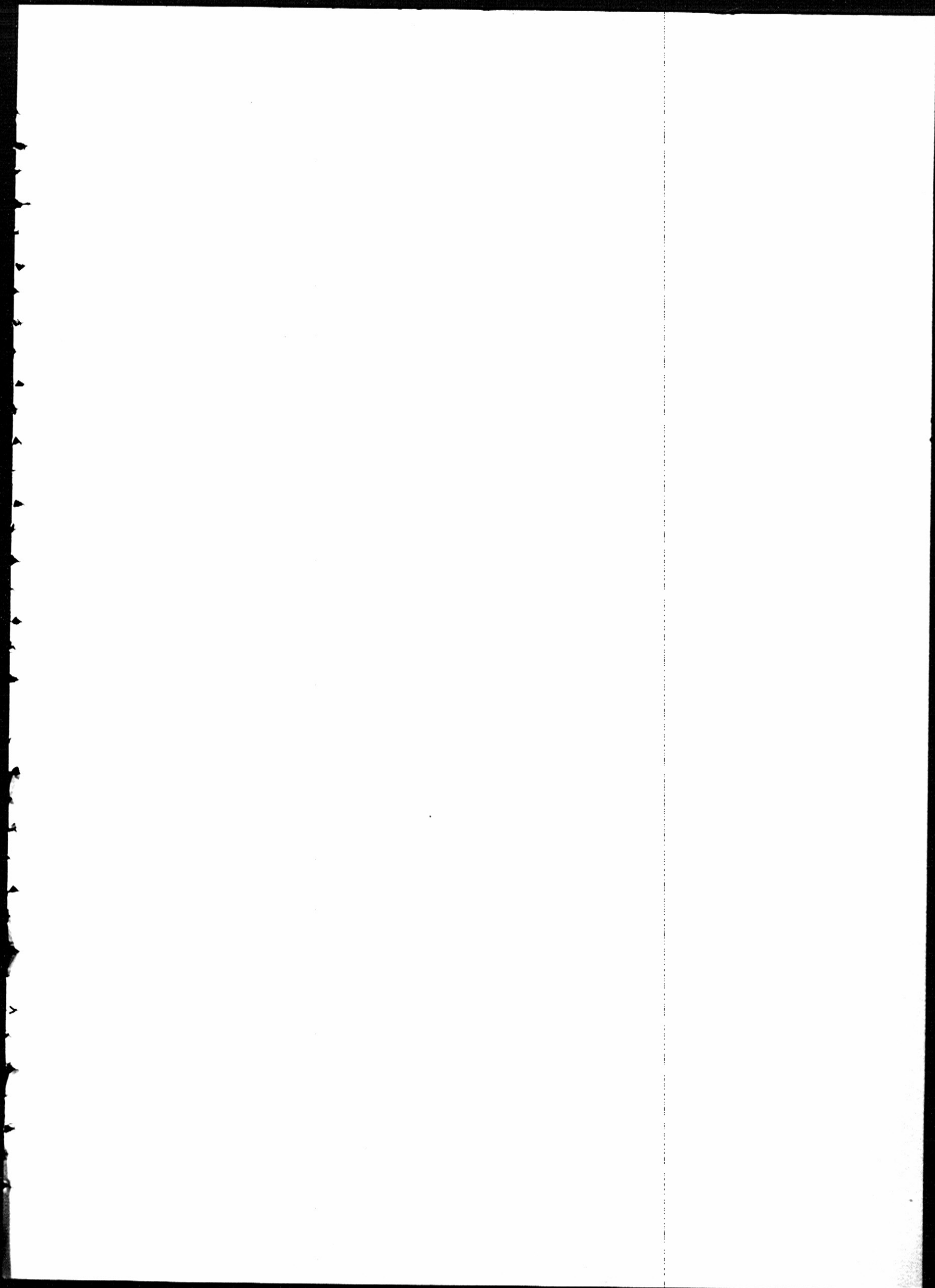
"(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

"(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

* * *

"(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof."

* * *



United States Court of Appeals
for the District of Columbia Circuit

FILED APR 20 1965

REPLY BRIEF FOR APPELLANT

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

K-SIX TELEVISION, INC.,

Intervenor.

On Appeal from Order of the
Federal Communications Commission

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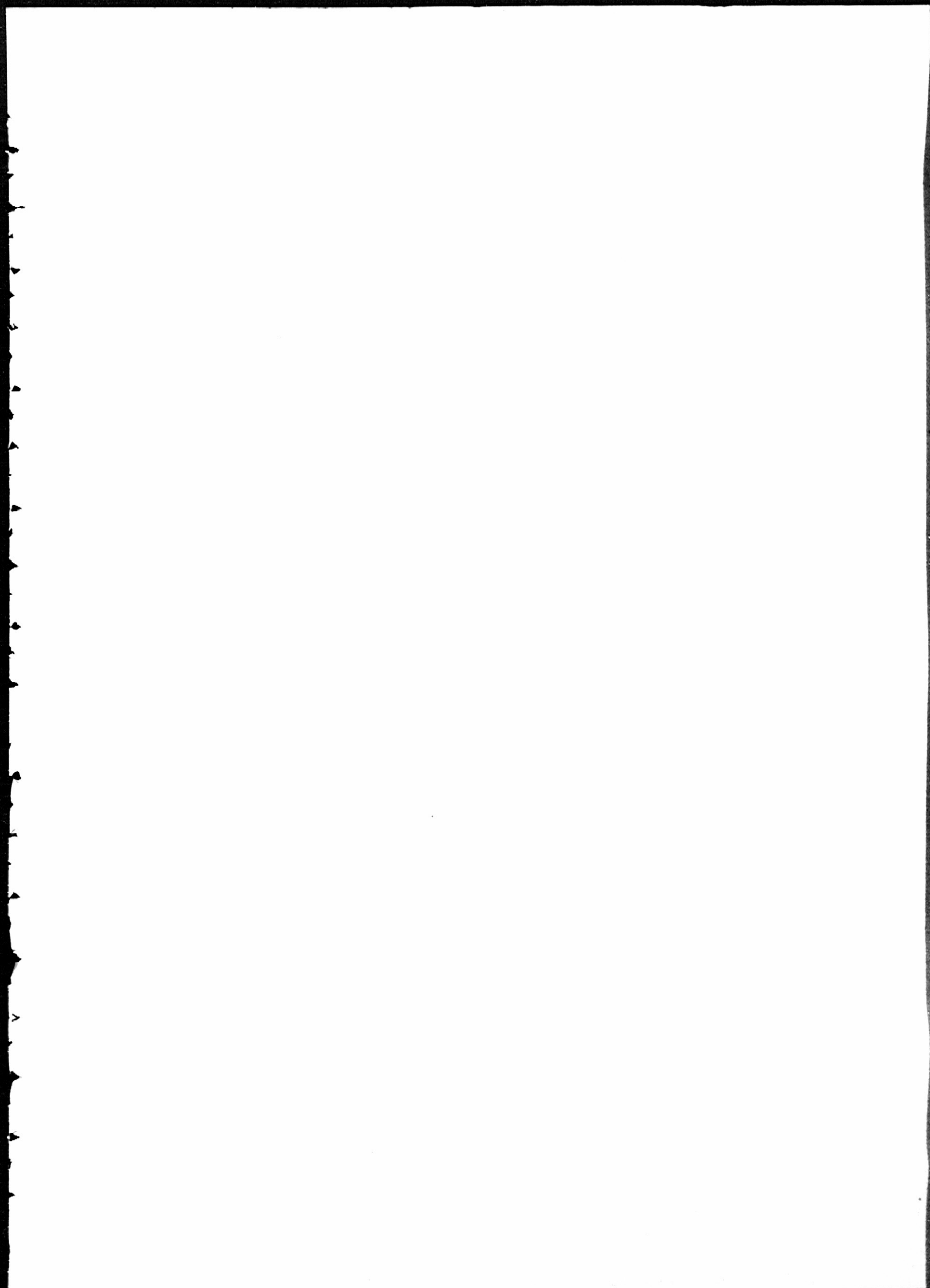


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United States Court of Appeals

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SOUTHWESTERN OPERATING COMPANY,

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REPLY BRIEF FOR APPELLANT

I.

K-Six's principal contention is that the needs of Laredo, Texas for a second local United States television station have already been considered by the Commission and this matter is, therefore, in effect, *res judicata*. But, the question principally involved here is whether

grant of K-Six's application will result in degradation of service available to Laredo; it is one which had never been acted upon by the Commission and, indeed, it is one which can be answered only in the context of an adjudicatory proceeding.

K-Six says that a controlling determination has been made in rule making proceedings but it ignores the actual nature of the proceedings to which it refers. The table of television assignments which the Commission finalized in the *Sixth Report*¹ did not evolve from considerations substantially involving economic potentialities of markets to which channels were assigned. Indeed, the principal considerations were technical ones and the Commission said:

"One of the principal reasons for an engineered Table of Assignments incorporated into our Rules is that it permits a substantially more efficient use of the available spectrum. It is clear that, mathematically, once a fixed station separation has been agreed upon, the maximum number of stations which can be accommodated on any given channel becomes fixed. In practice this theoretical maximum cannot be achieved since the location of cities capable of supporting such stations will not follow any such regular pattern of location. But an Assignment Table drawn upon an examination of the country as a whole can confidently be expected to more closely approximate the mathematical optimum, than would assignments of stations based upon the fortuitous determinations of individual applicants interested solely in the coverage possibilities in a particular community irrespective of the effect of such assignments on the possibility of making assignments in other communities. We are convinced that only through an engineered Table of Assignments can areas receiving no service or inadequate service be kept to a minimum." [*Id.* at 604.]

¹ Sixth Report on Television Allocations, 1 Pike & Fischer RR (Part 3) 91:599.

In fact, the Commission made channel assignments to communities which at that time were incapable of supporting television facilities.

"In our opinion there is an equally significant reason why a Table of Assignments should be established in our Rules. For while the record in this proceeding demonstrates that the desire for broadcasting service from local stations, reflecting local needs and interests is widespread, experience has shown that many of the communities which cannot now support television stations but would eventually be able to do so, will in the absence of a fixed reservation of channels for their use, find that available frequencies have been preempted." [*Id.* at 601-02.]

Thus, recognition was given the fact that certain channels might go unused until the markets to which they were assigned developed economically to the extent necessary to support television service.² Laredo, Texas, offers a striking example of the Commission's foresight. Channel 13 remained unapplied for for twelve years and it is only now that one applicant seeks to activate it but only because it can be supported by a major market facility. The Commission in no way intimated that an attempt prematurely to activate such channels would not be subject to challenge as contrary to the public interest, simply because the assignment had been made.³

² At the present time there are 556 commercial VHF channels allocated. There are 454 stations presently operating and 25 channels for which there are outstanding authorizations but on which there are no operations at the present time. There are 11 applications pending for the remaining 76 unused VHF assignments. It is clear, therefore, that by the Sixth Report and Order the Commission created some still commercially unfeasible assignments. See, Seiden, "An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry," February 12, 1965, at p. 10.

³ Even if no existing licensee is in a position to challenge such a proposal, the Commission itself has shown great concern with proposals which might be considered marginal. Cf. Ultravision Broadcasting Company, FCC 65-282, decided by a panel of Commissioners and presently under stay pending review by full Commission.

Neither can it be said that the Corpus Christi allocations proceeding is dispositive.⁴ At that time there had been no activity with respect to the Laredo channel owing to the obvious limitations of the market. At least one party pointed to this factor in supporting a shift in the assignment, but the Commission, insofar as can be determined, ignored the contention, being persuaded to approach a different solution to the questions before it.⁵

That proceeding, of course, ultimately resulted in the assignment of a third commercial VHF channel for Corpus Christi, Texas. The Commission's Report and Order is indicative of the extent to which K-Six opposed that assignment on the basis that Corpus Christi could not support an additional station without degradation in service to the public. K-Six requested that the Commission hold an adjudicatory hearing on the question prior to the time that the channel assignment was finalized. The Commission's answer to the contention indicates that the economic allegations could best be considered in the context of the proceeding on an actual application, rather than in rule making:

"The separate question of whether service to the public would be adversely affected by establishing a third TV outlet in Corpus Christi as claimed in the comments submitted by K-Six in this proceeding, has already been considered and disposed of. Whatever rights K-Six may have to press its point in such adjudicatory proceedings as may follow concerning subsequent authorizations to build a station on Channel 3 at Corpus Christi, K-Six does not have the right to demand the adjudication of that question in an evidentiary proceeding incidental to a decision on the question under consideration

⁴ Television Assignments at Corpus Christi, Texas, 18 Pike & Fischer RR 1793.

⁵ "With respect to its first alternative proposal for an additional VHF assignment, Coastal Bend argues that in view of the relatively small size of Laredo (population 52,000) it does not appear that the Laredo area can support two United States stations, that therefore Channel 13 can be deleted from Laredo and used to replace Channel 3 in Nuevo Laredo and thus Channel 3 can be used in Corpus Christi." [Id. at 1795-96.]

herein of whether Channel 3 should be assigned to Corpus Christi."⁶

K-Six also discusses at some length television proceedings which involved the question of deintermixture of television markets to which both UHF and VHF facilities had been assigned by the *Sixth Report and Order, supra*.

K-Six places principal reliance upon *Coastal Bend Television Company v. Federal Communications Commission*, 98 U.S. App. D.C. 251, 234 F.2d 686. But, that case does not stand for the proposition that a party who does not challenge an allocation in rule making is precluded from challenging an application for the allocated channel. The appellants⁷ were UHF licensees, seeking to have the Commission halt action on applications (which had proceeded through hearing) for VHF facilities. At the time of the appeals, the Commission had instituted a general rule making proceeding to consider the UHF-VHF problem. The Commission refused to stay action on the VHF applications since to do so would have been tantamount to a "freeze," which it deemed undesirable. The Court said:

"[W]e think that the Commission's decision to adhere to the 1952 allocation *for the time being*, as reflected in its refusal to institute a 'freeze' on construction permits for VHF stations to prevent competition with existing UHF stations, is well within its statutory authority: its decision was based on its finding that the VHF stations would bring additional television service to a significant number of people. True, there would be loss to the public if VHF competition should destroy existing UHF stations *before the current rule-making proceeding decides the ultimate fate of UHF television*. But whether one factor should outweigh the other is precisely the sort of question which Congress, by employing the broad

⁶ Television Assignments at Corpus Christi, Texas, 18 Pike & Fischer RR 1800, 1800j.

⁷ Coastal Bend was a consolidated appeal involving a number of separate proceedings at the Commission level.

language of Section 303, wished to commit to the discretion of an expert administrative agency, not the courts. It is for the Commission, not the courts, to pass on the wisdom of the channel allocation scheme. . . . *And we clearly should not compel the Commission to delay existing adjudicatory proceedings conducted in accordance with the statute and valid regulations thereunder in order to await the outcome of rule-making proceedings. . . .* [98 U.S. App. D.C. at 255. Emphasis supplied.]

The significant factor involved was that the questions which the appellants wished to raise were under consideration in a separate proceeding, and the Commission did not think that a "freeze", in effect, was warranted.⁸

Southwestern is not requesting that the Commission delete the assignment of Channel 13 from Laredo. It recognized in the pleadings filed that Laredo's economy is advancing (from a significantly low point) and that some day Laredo might be able to support a second competitive United States television facility. K-Six in this regard conveniently overlooks the unique nature of the facility which it proposes to operate.⁹

⁸ Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F. 2d 727, involved a situation similar to Coastal Bend. There, however, UHF operators challenged a VHF allocation, while the general rule making on deintermixture was pending. The allocation was sustained. It is significant that in Van Curler the Commission allocated, through rule making, a VHF channel in spite of the warnings of UHF operators. The remaining cases cited by K-Six follow a similar pattern, Springfield Tel. Broad. Corp. v. Federal Communications Commission, 104 U.S. App. D.C. 13, 15, 259 F. 2d 170 (1958); Jacksonville Journal Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F. 2d 686 (1956). All are clearly distinguishable in principle as well as fact. In all the direct question which the UHF operators sought to raise was under consideration or likely to be so.

⁹ K-Six has said that: "And, even if it be assumed that the Commission, under highly exceptional circumstances, would be required in an adjudicatory hearing to re-examine a determination theretofore made in a rule-making proceeding, it should only do so on the basis of an extremely persuasive and exceptional showing." K-Six Br. 7.

K-Six will rebroadcast in Laredo commercial announcements carried on KZTV in Corpus Christi. The resulting leverage which it will thus have with respect to advertisers will, it has been shown, result in substantial revenue losses to KGNS-TV, and ultimately in degradation of service to Laredo.

Southwestern stated in its Reply to Opposition to Petition to Deny:

"No weight can fairly be attached to the fact that Southwestern has not attempted to have Channel 13 deleted from Laredo. The channel has remained unused since 1952 and, subject to the Commission's determination herein, likely will remain so for a substantial period in the future. [Footnote: Perhaps someday, if not now, Laredo will be able to support a second fully competitive television station which offers a genuine local service, not a mere repeater service for a Corpus Christi station.] K-Six, for this purpose, would ignore completely the relationship between KZTV in Corpus Christi and Channel 13 in Laredo. It would deny the existence of pressure which it would be in a position to exert with respect to its competitors both in Laredo and in Corpus Christi. The K-Six application poses a greater threat, economically, than would a proposal advanced by an operator unable to exert economic leverage by virtue of its rebroadcasts of a Corpus Christi facility.

"Southwestern is not stating that it would not oppose an application filed by an 'independent' applicant. As with the K-Six proposal, it would study carefully any application for Laredo to determine the effect which it might have on Southwestern's operation and on the public which Southwestern serves. Clearly, the effect of an 'independent' operation would be less detrimental than that which would be experienced in the event of a grant of K-Six's Channel 13 application." [R. 275-76.]

Even if we grant, *arguendo*, that to one extent or another the questions here involved have been litigated, that is not dispositive. A unique factual situation may arise which makes the earlier determination immaterial. For example, two stations may exist side by side in a community and serve the public well. But, when one operator seeks to sell

his facility, the identity of the buyer may be such as to threaten the continuation of that service. The fact that one type operation might result in public benefit is not necessarily conclusive with respect to a factually different proposal. Cf. *The Central Connecticut Broadcasting Co.*, 1 Pike & Fischer RR 2d 639.

II.

Southwestern's principal allegations concern the ability of Laredo to support, without harm to the public, additional television service in the context of the K-Six application. In its decision, here under appeal, all that the Commission said in this regard was:

"Finally, the petitioner requests that the application be designated for hearing on a *Carroll* issue,¹⁰ alleging that the economy of Laredo is such that it could not support a second television station without diminution or loss of television service to the public. The facts alleged by the petitioner to support its request for a *Carroll* issue, however, were too generally stated, speculative, and not sufficiently related to the conclusions drawn by the petitioner to enable the Commission to determine whether a *Carroll* issue would be warranted. Accordingly, by letter dated August 18, 1964, the Commission afforded the petitioner an opportunity to submit the type of information which we have stated that we consider necessary to support a *Carroll* issue. By letter dated October 19, 1964, however, the petitioner advised the Commission that it 'will not submit additional information'. Consequently, we find that in the absence of such information, a *Carroll* issue is not warranted."¹¹

¹⁰ Referring to this Court's decision in *Carroll Broadcasting Company v. FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440.

¹¹ The quoted language indicates that the Commission reviewed the pleadings, determined their inadequacy, and then afforded Southwestern an opportunity to amplify its showing. It took a somewhat different approach in a radio case which involved an application filed April 27, 1962. In that case, the Commission wrote the "form letter" and when the petitioner failed to respond, it considered the case on the basis of the pleadings filed earlier. The Commission did not say there, as it has here, that prior to sending the letter it reviewed the pleadings and found the petitioner's case wanting. *James B. Holder*, FCC 65-146, released February 25, 1965.

The validity of the Commission's decision below must be judged on its asserted bases because an administrative agency's decision may not be sustained upon a rationale not contained in the decision. As the Supreme Court held in the leading case of *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88:

"In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering v. Gowran*, 302 U.S. 238, 245. . . . The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. *If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.* For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." ¹² [Emphasis supplied]

The Commission disposed of Southwestern's petition solely on the grounds of alleged inadequacies in Southwestern's assertions. Neither the Commission nor K-Six may now support the decision with respect to

¹² See also, Democrat Printing Company v. Federal Communications Commission, 91 U.S. App. D.C. 72, 77-78: "But we cannot decide now whether this reason suffices to support the order. Our review is limited to reasons which the Commission relied upon for its action." Telanserphone, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 398, 231 F. 2d 732.

the *Carroll* issue on the basis of matters not articulated in the Memorandum Opinion and Order. Thus, even apart from the inadequacy of the contentions themselves, considerations such as the extent of Mr. Donald Reynolds' other interests,¹³ the alleged superior service proposed by K-Six, the fact that Southwestern did not say "why" it was not providing additional information to the Commission, and similar matters may not now be advanced to support the decision erroneously made below.

Throughout their briefs, both K-Six and the Commission imply that, irrespective of the effects of a grant upon Southwestern, there will be substitution rather than destruction of programming. (See, *e. g.* FCC Br. 22; K-Six Br. 13.) Such a rationale was in no way intimated in the decision below but, even apart from that consideration in the context of the *Chenery* case, *supra*, the position is without merit. The serious shortcomings with respect to the K-Six programming proposals were discussed in Southwestern's opening brief:

"Since K-Six proposed only a small number of local presentations (scheduled almost without exception in periods adjacent to 'sign-on' times when audiences are minimal) and since no noncommercial spot announcements suited particularly to Laredo would be presented, programming which KGNS-TV would be forced to delete would not be compensated for by the added service (R. 133-134)." [Appellant's Br. 5]

¹³ The Commission intimates that a major broadcaster may be expected to support losing operations with his profitable ones (FCC Br. 18). Even apart from the untenable nature of that position, the Commission has given a grossly distorted picture of Mr. Reynolds' communications holdings by its assertion that they are located in the southwestern portion of the country (FCC Br. 2). Mr. Reynolds' only broadcast interests in the State of Texas are the Laredo facilities. He operates two radio stations and one television station in the State of Arkansas. He is the permittee of a second Arkansas television station which is presently off the air and for which an assignment application is presently pending. His remaining broadcast interests are located in the State of Nevada. His only newspaper interest in the State of Texas is in Levelland, a community with 1960 population of 10,153.

A station's programming, in large measure, may be judged by the degree to which it is accepted by the public. The pleadings below disclose clearly that Southwestern's programming is designed to serve the needs of Laredo and that the public considers it more than adequate in spite of K-Six's attempts to obtain assertions to the contrary (R. 301, 313-30).

The Commission contends that Southwestern's allegations concerning the inadequacy of K-Six's staff and its ability, therefore, to present even public service announcements designed for Laredo are insubstantial. It is submitted, however, that the question of to what extent, if any, K-Six can provide programming deleted by Southwestern is directly pertinent to the question which was before the Commission.¹⁴ Furthermore, a programming proposal is meaningful only in the context in which it is advanced. The fact that the applicant might represent to the Commission that it will provide a substantial amount of local live programming is immaterial unless the applicant also shows an ability to fulfill that promise. See, *Birney Imes, Jr.*, 17 Pike & Fischer RR 419; *Kenneth F. Warren*, 21 Pike & Fischer RR 15.

The Commission cannot justify its failure to examine this question on the basis that Southwestern raised the matter for the first time in its Reply. Because of representations which had been made by K-Six both in its application and in a personal conversation (R. 62, 311), Southwestern did not challenge in its petition to deny K-Six's ability to provide the minimal service proposed. When K-Six revealed the true nature of its proposed service in its opposition to Petition to Deny, and itself furnished information indicative of the inadequacy of its staff (R. 266, Appellant's Br. 5, fn. 4), these matters first became apparent and were an appropriate subject for the Reply.

¹⁴ Carroll Broadcasting Company v. FCC, *supra*; FCC v. Sanders Brothers Radio Station, 309 U.S. 471.

The Commission and K-Six both raise the question of the physical superiority of K-Six's proposed operation over that of KGNS-TV. The Commission did not, however, reject the *Carroll* contentions because of this factor and, indeed, in the context of the economic arguments, it failed even to mention it.¹⁵ The factual situation here involved demands that the superior coverage proposed by K-Six be given little weight. K-Six proposed a transmitter site for Channel 13 located approximately 113 miles from the transmitter site of KZTV. Section 73.636(a)(1) of the Commission's Rules and Regulations, Title 47, C.F.R., §73.636, provides that common ownership of television broadcast stations, the Grade B coverage contours of which overlap, will not be permitted. The rule is to be considered in connection with applications submitted for the improvement of television broadcast stations.

While the proposed Grade B contour of Channel 13 does not overlap the Grade B contour of KZTV, the separation between the two will be minimal. Furthermore, the physical proposal for Channel 13 is far from the maximum permitted by the Commission's rules.

In amending its multiple ownership rules to preclude Grade B overlap of commonly-owned television facilities, the Commission rejected an earlier proposal to compute overlap on the basis of the assumption that both stations operated with maximum facilities. It did so apparently because the problems sought to be resolved by that method could be considered adequately on a case-by-case basis. The idea of computing overlap on the basis of maximum facilities was to prevent authorization of facilities which, because of "duopoly" problems, would be rendered incapable of improvement.¹⁶ As Southwestern said in its Reply below, even the K-Six proposal leaves substantial "white areas" unserved and there is much greater chance of additional service to "white areas" being

¹⁵ See, Securities & Exchange Commission v. Chenery Corp., *supra*; Democrat Printing Company v. Federal Communications Commission, *supra*; Telanserphone, Inc. v. Federal Communications Commission, *supra*.

¹⁶ Amendment of Multiple Ownership Rules, 2 Pike & Fischer R.R. 2d 1588, 1600.

provided if KGNS-TV is not so limited by the competitive impact that it cannot expand its facilities when economies otherwise would permit (R. 294-95). Southwestern also pointed out that since it had commenced operating Station KGNS-TV it had once increased power and was engaging in a program of improving its technical facilities and that at that time it was studying the possibility, both economically and technically, of a further power increase. (R. 293).¹⁷

IV.

The Commission's characterization of the form letter which it sent to Southwestern affording it an opportunity to amplify its pleadings below is not persuasive. The Commission now says that answers to the questions raised in the Memorandum Opinion and Order,¹⁸ attached to the letter were not necessarily required in order to give rise to a *Carroll* issue. Certainly, in view of the content of the letter, this is a tenable position since nothing indicated that a review of the pleadings had been made and Southwestern's case had been found wanting.

But, the decision below was based on the asserted fact that the Commission reviewed Southwestern's allegations and found that they were insufficient to give rise to the requested issue. Therefore, it then afforded Southwestern an opportunity to amplify its pleadings. The decision below indicates clearly that, in this particular case, answers were, in effect, required.

On the basis of its own decisions, it can now be seen that the Commission has taken three entirely different approaches to *Carroll* issue questions subsequent to this Court's decision in *KGMØ Radio-Television, Inc. v. FCC*, ___ U.S. App. D.C. ___, 336 F. 2d 920.

¹⁷ On December 16, 1964, Southwestern filed an application with the Federal Communications Commission requesting authority to improve the facilities of KGNS-TV. The studies discussed above which led to this application were instituted long before K-Six had filed its application for Channel 13 in Laredo.

¹⁸ Missouri-Illinois Broadcasting, Inc., 3 Pike & Fischer RR 2d 232.

In this particular case, it reviewed the pleadings, so it says, prior to sending the subject letter. In doing so, however, it ignored the fact that the questions which it purportedly sought to have answered were, for the most part, completely unrelated to the facts of this case and, to a large extent, answers had been provided (Appellant's Br. 24-29). In effect, the Commission required the information but failed to put Southwestern on notice that it was doing so. In the remand of the *KGMO* case,¹⁹ the Commission took a somewhat different approach. There, however, it clearly required of the petitioner answers to the various questions in stating:

"In the event that *KGMO* does not submit the information specified in paragraph 6 [in which the 18 questions were set forth], the Commission will dismiss the *KGMO* petition for reconsideration and dissolve the outstanding stay of the construction permit of Missouri-Illinois Broadcasting Co."

And, in a third case, the Commission has intimated that a petitioner may be able to make a case irrespective of whether it answers the specific questions propounded by the Commission. *James B. Holder, supra*.

Most significantly, however, the Commission's brief ignores the consideration that facts will differ from case to case. It does recognize, somewhat parenthetically, that most of the questions raised by the letter pertain to the economies of radio broadcasting although we are dealing with a television case. It does not give any recognition to the fact that most of the questions also deal with the question of lost local revenues

¹⁹ Missouri-Illinois Broadcasting, Inc., 3 Pike & Fischer RR 2d 232.

which was not before the Commission in this proceeding.²⁰

The facts of this case fully support the conclusion that the Commission has effectively set forth a specific set of questions, many of which may be wholly irrelevant, but all of which must be answered by all *Carroll* petitioners. There is no consideration for the different facts of each particular case. In the absence of answers to such questions, the Commission will dismiss the petition to deny, without regard to the plain language of Section 309 of the Act.

V.

K-Six did say in its Opposition that it had held discussions with community leaders in Laredo concerning its proposed programs. At the same time, the record is clear that: (a) K-Six proposes principally a rebroadcast facility in Laredo which will duplicate to a large extent the programming of K-Six's Corpus Christi station; (b) the local live presentations proposed by K-Six almost uniformly are scheduled for periods immediately adjacent to sign-on times when the audience is minimal; (c) insofar as can be determined, no local public service announcements will be broadcast by K-Six; and (d) almost all of the local live programs which K-Six proposes for Laredo have counterparts in its Corpus Christi schedule.

The fact that *some* survey work was done is not, on the basis of prior Commission determinations, necessarily conclusive. The community survey work must be meaningful:

²⁰ The Commission justifies its failure to seek clarification of K-Six's plans for selling time in Laredo on the basis that it afforded Southwestern an opportunity to show injury in this area. Southwestern stated clearly, however, that it would be unable to do so without information concerning K-Six's proposed revenues. Otherwise, it could not determine the extent to which K-Six would concentrate on the Laredo market. The Commission would also attach significance to the fact that Southwestern did not tell the Commission why it was not providing additional information. We know of no policy which would require a party in an adversary proceeding to reveal the underlying reasons for its activities, or lack thereof. This is entirely apart from the consideration that the communication referred to was a "form letter" sent to all petitioners with Carroll pleadings before the Commission.

"In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and *should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can.* He should reasonably attempt to meet all such needs and interests on an equitable basis. Particular areas of interest and types of appropriate service may, of course, differ from community to community, and from time to time. However, the Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests." [*Report and Statement of Policy Re: Commission En Banc Inquiry*, 20 RR 1901, at page 1913. Emphasis supplied.]

The Commission has said that a survey alone is not enough and that the findings which evolve from that survey must be carried over into the proposed programming schedule. As the considerations discussed above reveal, no such showing has been made here and it was arbitrary and capricious for the Commission, in view of its past determinations, not to designate the K-Six application for hearing.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Appellant's opening brief, the decision of the Federal Communications Commission of November 18, 1964, must be reversed and this case remanded to the Commission with instructions that a hearing be held on the allegations made by Southwestern in its Petition to Deny and related pleading.

Respectfully submitted,

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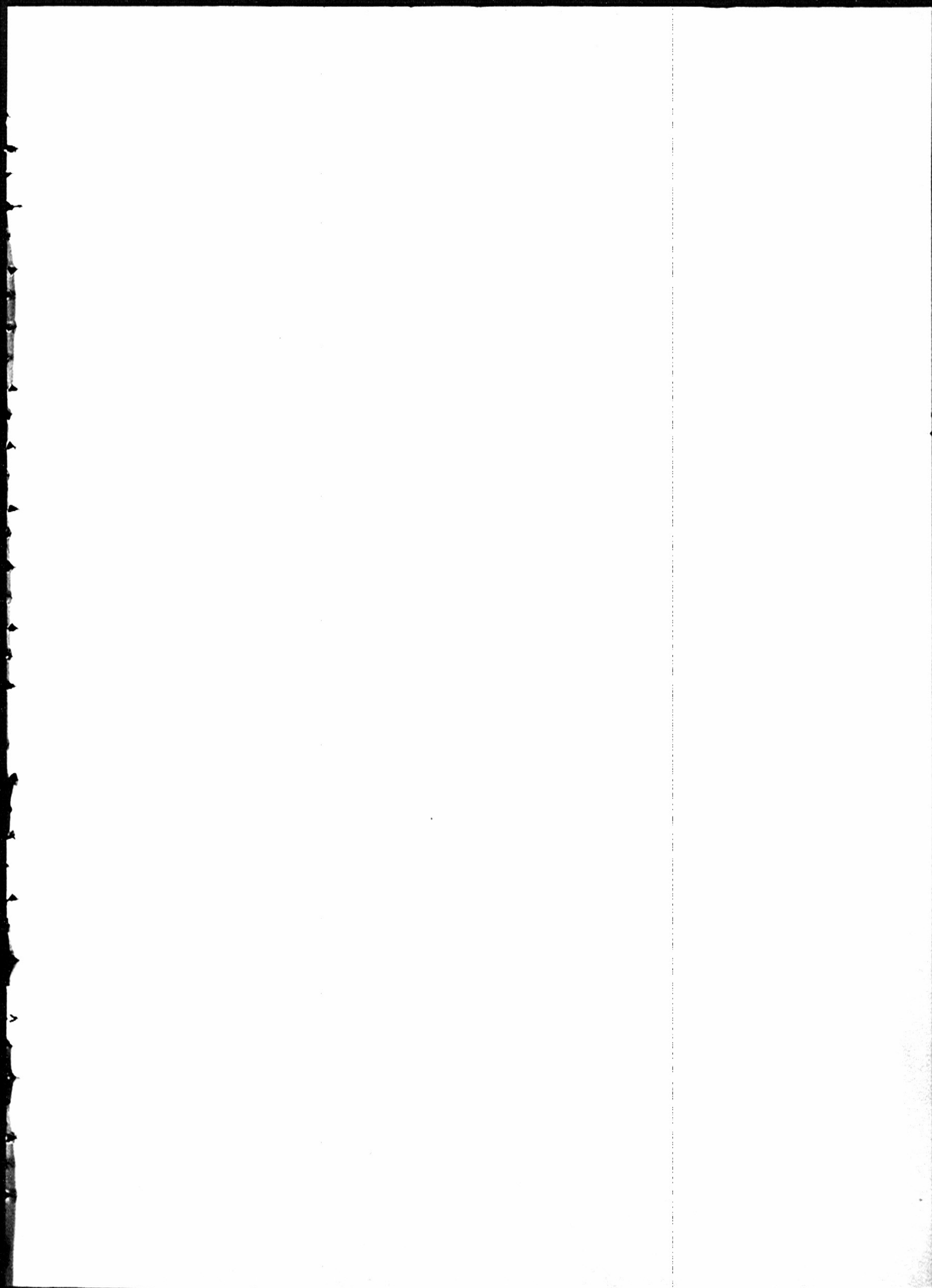
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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

K-SIX TELEVISION, INC.,
Intervenor.

ON APPEAL FROM A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION.

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General Counsel,

United States Court of Appeals
for the District of Columbia Circuit

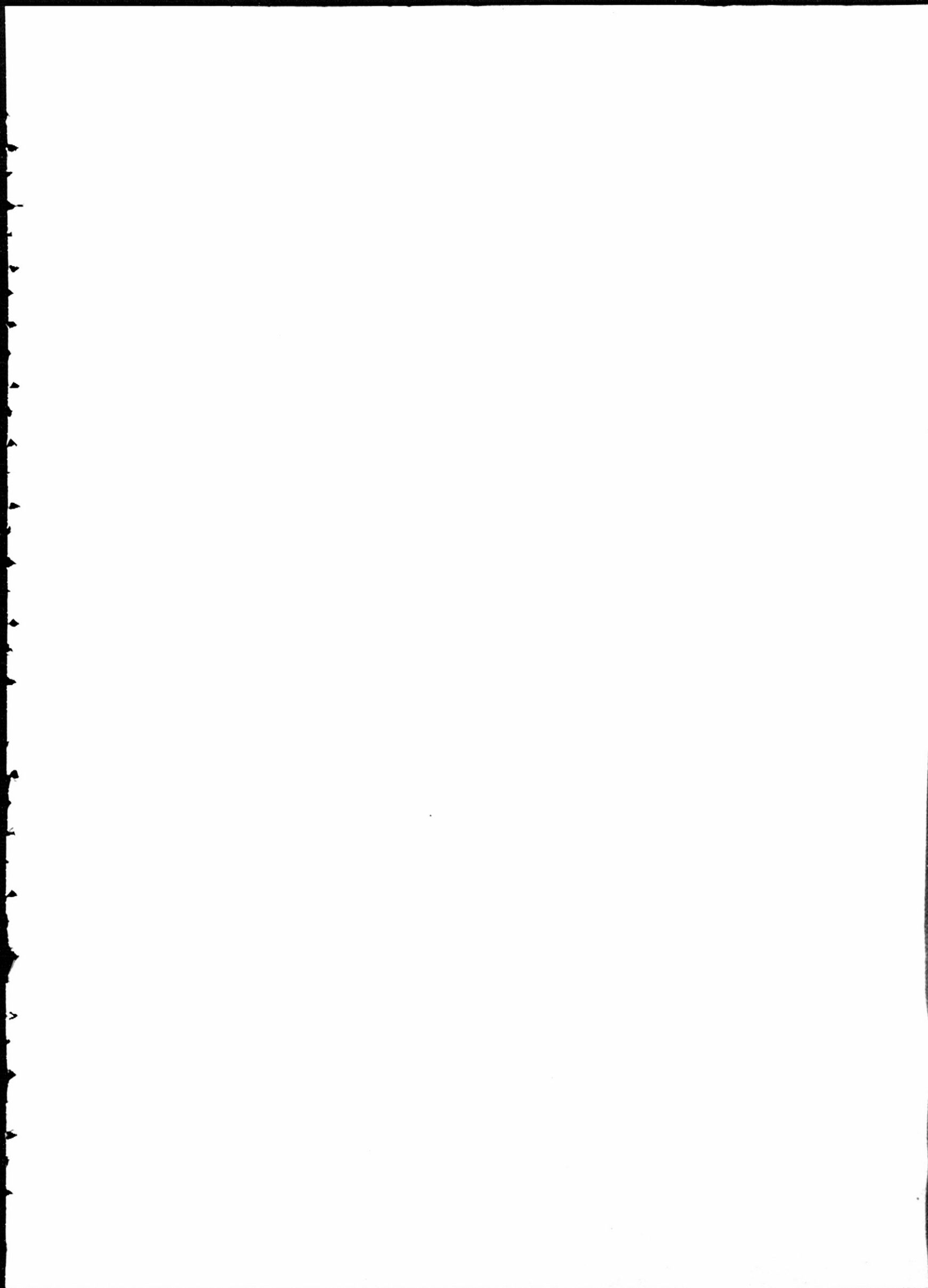
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FILED APR 5 1965

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STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on January 28, 1965, are as follows:

1. Whether the action of the Commission granting without an evidentiary hearing intervenor's application for a new television station to operate in the same community as appellant's television station was contrary to Section 309(e) of the Communications Act of 1934, as amended, which requires the Commission formally to designate an application for hearing if a substantial and material question of fact exists with respect thereto or if the Commission is unable to make a finding that a grant would serve the public interest, convenience and necessity.

2. Whether the action of the Commission granting intervenor's application without evidentiary hearing or without requiring additional information of intervenor was contrary to Section 308(b) of the Communications Act of 1934, as amended, which requires that applications set forth such facts as the Commission by regulation or otherwise requires.

3. Whether the Commission acted arbitrarily or capriciously or otherwise unlawfully in granting intervenor's application without evidentiary hearing or without requiring additional information of intervenor.

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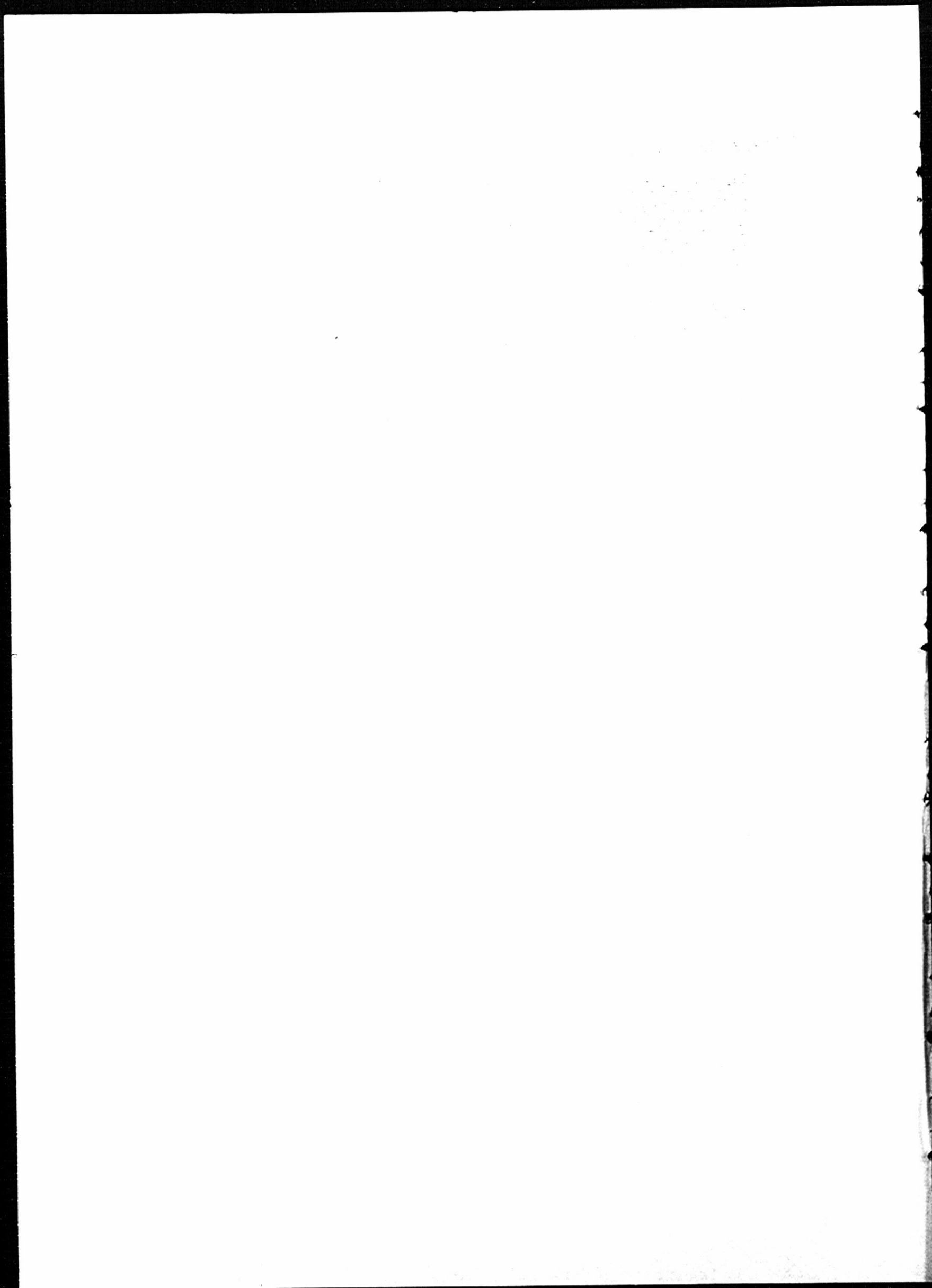
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*Cases chiefly relied upon are marked with an asterisk.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

K-SIX TELEVISION, INC.,
Intervenor.

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION.

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) (6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b) (6), from a Memorandum Opinion and Order of the Federal Communications Commission adopted November 18, 1964, and released November 19, 1964 (R. 339-342). The order (1) granted the application of intervenor, K-Six Television, Inc. (K-Six) for a construction permit for a new commercial television station to operate on Channel 13, Laredo, Texas and (2) denied a pre-grant petition to deny filed by Southwestern Operating Company (Southwestern) against the Commission's grant, without hearing, of the K-Six application. It is believed that a more complete statement of the background of the case than that contained

in appellant's brief will be helpful to the Court.

On February 17, 1964, K-Six filed an application for a new television station at Laredo, Texas, to operate on Channel 13 (R. 1-92). K-Six is the licensee of television broadcast station KZTV, operating on Channel 10 at Corpus Christi, Texas, and is a CBS network affiliated station. The facility it proposed would provide a first competitive television service to Laredo and in addition would bring service to some 2,800 people who reside in an area that presently receives no television service. K-Six set forth its programming plans as follows: "The proposed new station would provide the area with the complete program schedule of CBS Television Network, plus worthwhile regional and local programming (R. 62)." While a large portion of station KZTV's programming would be rebroadcast on Channel 13, K-Six also proposed to establish an independent studio in Laredo, equipped for locally originated programming and easily accessible to the public (R. 62).

Southwestern is the licensee of KGNS-TV, the only television station presently operating in the community. It also operates radio station KGNS, one of two AM stations in Laredo. Its owner, Donald W. Reynolds has a controlling interest in four other VHF television stations, five other AM stations, and an FM station, all located in the Southwestern part of the country. He also has extensive interests in over a dozen newspapers located in the Southwestern portion of the country, Alaska and Hawaii. (R. 153-154).

On March 27, 1964 Southwestern filed a petition to deny the K-Six application, pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d) (R. 98-142). It contended that the establishment of a second television station in Laredo, Texas, would cause such severe economic injury to station KGNS-TV that a "curtailment of public service and local live programs to the detriment of the public" would result in the area served by station KGNS-TV (R. 103). Accordingly, appellant requested the Commission to designate the K-Six application for hearing. In addition, inter alia, Southwestern maintained that an evidentiary hearing was also necessary to ascertain whether K-Six had properly determined the programming needs and interests of the Laredo community. (See Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied 371 U.S. 821 (1962)).^{1/}

In support of its request for a hearing on the question of economic injury, Southwestern pointed out that the Laredo area had been depressed economically, but conceded that it was now experiencing some growth due to federal financial assistance (R. 110-112). Southwestern stated that while KGNS-TV was the only U.S. television station in the Laredo area, it received substantial com-

^{1/} Southwestern also claimed that K-Six proposed a "satellite" operation because its programming would consist primarily of rebroadcasts from its television station in Corpus Christi, KZTV. In addition, it claimed that K-Six was not financially qualified to operate Channel 13. Corpus Christi, Texas, is approximately 113 miles east of K-Six's proposed transmitter site (R. 69). No argument is presented, however, on the Commission's determination that K-Six's proposed operation was not a "satellite" (R. 340), or on its determination that K-Six was financially qualified to be a licensee (R. 341).

petition from other advertising and communications media (R. 112-117).^{2/} Southwestern further stated that station KGNS-TV had operated with increasing profits in recent years, although they were allegedly "small" in comparison to other television stations in the United States (R. 117-125). It asserted that the advent of a second television outlet in Laredo would result in a loss to station KGNS-TV of national and regional advertising accounts, and would also cause it to lose CBS network programs, (R. 122-126) which would now be carried over the new facility. Southwestern maintained that any such decline in advertising revenues would necessarily result in a decline of its local live programming, and that the public would suffer thereby inasmuch as the new programming service allegedly would not compensate for Southwestern's curtailment of local, or public service programming (R. 126-135).

K-Six filed a pleading in opposition to Southwestern's petition to deny on May 21, 1964 (R. 150-270), and maintained that Southwestern had failed entirely to allege facts which, if proven, would establish that the grant of a second television station in Laredo would be inimical to the public interest (R. 159). Recognizing that the Laredo community would not support a second television station if that station had to utilize expensive cable interconnection to receive network programs, K-Six proposed to operate Channel 13 by offering substantial local, live programming, and by rebroadcasting network and recorded programs of station KZTV

^{2/} In addition to the two radio stations in Laredo, there is also a daily newspaper and one published weekly (R. 113).

at Corpus Christi, Texas (R. 155-156). In this manner, K-Six said it was following the example of station KGNS-TV that rebroadcasting the network programs of other stations, rather than relying upon cable interconnections to receive those programs, was the most practical mode of operation. Also, K-Six indicated that it proposed no revenues for the first year operation of Channel 13 in order to demonstrate its financial qualifications to operate immediately without revenues, and its readiness to offer the proposed programming absent any revenues. In fact, K-Six pointed out that while it would put the station on the air before its sales staff was established, it did intend, however, at a subsequent time, to sell advertising in Laredo and to operate Channel 13 as a fully competitive business (R. 157).

With regard to Southwestern's allegations concerning the "Laredo economy", K-Six noted the absence of allegations in Southwestern's pleading concerning existing or potential advertising revenues in the Laredo area (R. 160). K-Six claimed that Southwestern's representations regarding the economic health of the Laredo area were somewhat misleading inasmuch as Southwestern's own sale brochures and statistics pictured Laredo as having a sound and growing economy (R. 175-180, 251-255). In comparison, K-Six submitted numerous statistical data, newspaper excerpts, and statements of Laredo community leaders supporting the proposition that Laredo was experiencing a period of economic growth (R. 176-180, 204-251).

Furthermore, K-Six contended that Southwestern had not met its burden of specifically showing the effect a grant of the K-Six application would have on Southwestern's present service to the public and on total service to the public. See Missouri-Illinois Broadcasting Company, 1 Pike & Fischer, R.R. 2d 1 (1963). Specifically, K-Six alleged that other than its mere allegations that loss of revenues would result in a cutback or curtailment of public service programming, Southwestern submitted no concrete facts of the cost of such programming, or the savings which would be realized from such cutback or curtailment. No facts were shown by appellant indicating that non-local programs were less costly than local programs, or what programs, if any, would have to be discontinued. In short, K-Six contended that Southwestern made no factual showing that loss of revenues to it would deprive the public of any program service now rendered by station KGNS-TV, or that even if station KGNS-TV were forced off the air, service to the public would be any less than it presently was (R. 169-170).^{3/}

Appellant filed a reply pleading to K-Six's opposition on June 24, 1964 (R. 273-332). It asserted that K-Six had made

^{3/} K-Six also stated that even if its new television station was constructed in Laredo, Southwestern's public service programming would not necessarily be impaired. It claimed that an analysis of Southwestern's programming for the first quarter of 1964 indicated that station KGNS-TV telecast its public service programs on the most economical basis, between network periods and adjacent to local commercially available programs. Moreover, K-Six charged that Southwestern's programming was of a "pedestrian" nature, whereas K-Six's local live programming was of a superior nature (R. 184-185, 263-267).

conflicting allegations before the Commission and requested the Commission to require K-Six to clarify its previous position by submitting additional information in the following areas: its intentions to sell local advertising in Laredo; whether or not a separate rate structure would be established for national and regional advertisers whose commercials would be telecast over station KZTV in Corpus Christi and Channel 13 in Laredo; and the adequacy of K-Six's staffing proposals, financial qualifications, and programming (R. 308-309). In response to K-Six's statements on the alleged failure of Southwestern to raise a Carroll issue in its petition to deny, Southwestern stated:

Southwestern cannot, and does not believe that the Carroll case demands that it assert which public service program or announcement would be the first "to go". Too many variables are involved in reaching such a decision. Southwestern has shown that if the K-Six application is granted it will lose irreplaceable revenues, that its expenses in producing live programming are greater than for other programs and that it would turn to revenue producing or less expensive items in an effort to offset losses. Nothing more is required (R. 299-300).

By letter mailed August 18, 1964, the Commission indicated to Southwestern that its petition to deny contained insufficient factual information with respect to its allegations that the Laredo area cannot support another station without a net loss or degradation of program service to the area (R. 335-336). Appellant was apprised of this Court's decision in KGMO Radio-Television, Inc. v. Federal Communications Commission, ____ U.S. App. D.C. ____, 336 F.2d 920 (1964), affirming the Commission's competence to require

specific factual information in competitive injury cases. A copy of the Commission's Memorandum Opinion and Order in the Missouri-Illinois case, 3 Pike & Fischer, R.R. 2d 232 (1964), was also enclosed in order to inform appellant of the type of additional information necessary to support an economic injury issue.

On October 19, 1964 Southwestern replied, stating that ". . . Southwestern Operating Company will not submit additional information with respect to the K-Six Television, Inc. application." (R. 337). Although Southwestern was now clearly on notice that K-Six intended to sell time in Laredo, it chose not to supplement its pleadings with any additional information bearing on this point. No reason or explanation was given for this action.

By a Memorandum Opinion and Order released on November 19, 1964 (Commissioner Cox dissenting) (R. 339-342), the Commission determined that Southwestern's failure to submit the information requested in the Commission's letter of August 18, 1964 warranted a denial of its request for a hearing on the economic injury issue. For, absent such information, the Commission found that appellant's allegations were "too generally stated, speculative, and insufficiently related to the conclusions drawn" to raise a substantial question of fact requiring an evidentiary hearing pursuant to Section 309(d) of the Act.

The Commission also held that K-Six proposed to make a full and efficient use of Channel 13 in Laredo, thereby raising no question as to the allocation of that channel to Laredo. 47 U.S.C. 307(b).

Specifically, the Commission noted that K-Six proposed a larger amount of local live programming than had Southwestern in the most recent renewal application, that this amount would be increased as time went on, and that it planned to establish a local studio in Laredo for such programming. The Commission also pointed out that K-Six would provide more extensive coverage to the Laredo area than Southwestern now provides, and would in fact provide a first television broadcast station to 2,800 persons (R. 340).

It also determined that K-Six clearly demonstrated that it had made a substantial effort to ascertain the program needs and interests of the Laredo community. The Commission relied on K-Six's statements, none of which were controverted by Southwestern, that it had visited, studied, and analyzed the needs of its proposed coverage area, and that it had conducted extensive interviews with at least 35 leaders of the Laredo community. On the basis of these efforts, K-Six indicated that the validity of its programming proposal was thus confirmed (R. 340).

The Commission also found that K-Six was financially qualified to construct and operate the station. It held that Southwestern's allegations concerning K-Six's plans with respect to selling time in Laredo, advertising rates, and the origin of spot announcements which K-Six proposed to broadcast, bore no relationship to the question of K-Six's financial qualifications, nor were

they material or relevant to the matters before the Commission.^{4/} (R. 341). And finally, the Commission concluded that Southwestern's allegations pertaining to the adequacy of K-Six's staff raised no substantial question of fact.

The appeal in this case was filed by appellant on December 11, 1964. On the same day it filed a Motion for Stay of the order of the Commission. On January 12, 1965, following the submission of pleadings and argument by counsel, this Court denied Southwestern's request for stay.

^{4/} The Commission also indicated that in raising these objections, appellant had failed to comply with Section 1.45(b) of the Commission's rules, 47 CFR 1.45(b).

SUMMARY OF ARGUMENT

I.

The Commission properly concluded that appellant failed to make a factual showing warranting a hearing on the issue of competitive economic injury. Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958); KGMO-Radio-Television, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 336 F.2d 920 (1964). An objecting party, seeking to afford himself of the remedy provided by Section 309(d), is required to present "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with" the public interest. Competitive economic injury to an existing station is not a sufficient reason for denying an application for a new broadcast station, unless the public interest is also adversely affected. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). In this case, the Commission carefully considered the need for a hearing but held that the facts alleged were too generally stated and not sufficiently related to the conclusions drawn by appellant to warrant further proceedings. No abuse of the Commission's discretion has been shown.

Southwestern's factual allegations failed to demonstrate that the public interest, as opposed to its own interest, would be adversely affected by the grant to K-Six. No detailed showing was made how a grant to K-Six would cause a net loss or degradation of

service to the Laredo area, which this Court has stated is really the essence of a request for a Carroll issue. Commission precedent afforded notice of the burden incumbent upon a petitioner to demonstrate a likelihood of injury to the public. KTBS, Inc., 25 Pike & Fischer, R.R. 301 (1963). And more importantly, the Commission's letter requesting such information was actual notice that this information would be regarded as pertinent. Missouri-Illinois Broadcasting Co., 1 Pike & Fischer, R.R. 2d 1 (1963); 3 Pike & Fischer, R.R. 2d 232 (1964). Appellant was fully apprised of the fact that absent additional information, the Commission would act on the K-Six application and petition to deny as originally filed. KGMO-Radio-Television, Inc. v. Federal Communications Commission, supra. By failing to submit additional information, appellant assumed the risk that its original pleadings might be found inadequate.

II.

The Commission properly concluded on the basis of K-Six's showing that it had ascertained the programming needs and interests of the Laredo area, and that a programming issue was not warranted. Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied 371 U.S. 821 (1962). K-Six set forth in great detail its endeavors to determine the programming needs of Laredo. Appellant has made no showing that K-Six's programming would not be responsive to the needs of Laredo nor has it alleged any facts casting doubt on the manner in which these needs were ascertained by K-Six. Hayward F. Spinks, 23 Pike & Fischer, R.R. 181 (1962).

III.

Finally, Southwestern's claim that the Commission should have sought further information from the applicant with respect to its financial and programming aspects is without merit. The K-Six submission was wholly in accord with the agency's requirements in these areas. No substantial question has been shown to exist with respect to the applicant's financing or its program proposal. And to the extent that appellant may initially have misconstrued the applicant's intentions regarding the local sale of broadcast time, Southwestern was afforded an opportunity to supplement its allegations of public injury but failed to do so.

ARGUMENT

I.

THE COMMISSION CORRECTLY DETERMINED THAT SOUTHWESTERN HAD FAILED TO MAKE A FACTUAL SHOWING WARRANTING A HEARING ON THE ISSUE OF COMPETITIVE ECONOMIC INJURY.

A. Whether Or Not A Hearing Was Required Is A Matter Committed In The First Instance To The Discretion Of The Commission; No Abuse Of That Discretion Has Been Shown.

We agree with the appellant that the crucial question presented here is whether it alleged sufficient facts in its pleadings to require an evidentiary hearing on the question of whether the economic impact of a second television station in Laredo, Texas, would result in injury to the listening and viewing public. (App. Br. 11-17.) For the law is clear that economic injury to an existing broadcast station is not by itself ground for denial of a new, competing broadcast application unless resultant harm to the public interest is shown, Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940). This Court has also stated that "economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service," see Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 349, 258 F.2d 440, 443 (1958); accord, KGMO Radio-Television, Inc. v. Federal Communications Commission, __ U.S. App. D.C. __, 336 F.2d 920 (1964); cf. Valley Telecasting Co. v. Federal Communications Commission, __ U.S. App. D.C. __, 336 F.2d 914 (1964). Southwestern's request for a hearing must be based, therefore, on a

claim that the public interest rather than its own interest will be harmed by a grant to K-Six.

The Commission found here that Southwestern's allegations did not suffice to show that a grant would result in injury to the public, and that Southwestern's subsequent failure to submit additional information when requested by the Commission, justified a denial of its petition (R. 342). Appellant has failed to show that this action was inconsistent with the statutory standard.

Section 309(d) of the Communications Act, 47 U.S.C. 309(d), provides for grants without hearing where the Commission finds, after consideration of the application and all relevant pleadings, that there are no substantial and material questions of fact outstanding and that a grant is in the public interest. The statute provides that where a petition to deny is filed, it must "contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with" the public interest, 47 U.S.C. 309(d)(1). But where the Commission finds that this showing has not been made, the petition to deny may be disposed of by "a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." 47 U.S.C. 309(d)(2).

In amending the statute in 1960, it was the intent of Congress that petitions to deny filed under the new Section 309(d) should make:

"* * * a substantially stronger showing of greater probative value than is now [was] necessary in the case of a post grant protest. The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general

affidavits, as is now [was] possible with protests,
are not sufficient. * * *^{5/}
S. Rept. No. 690, 86th Cong., 1st Sess., p. 3.

The Commission is to "be guided by rules applicable to a motion for summary judgment rather than, as under the present protest procedure, to a demurrer." S. Rept. No. 690, 86th Cong., 1st Sess., p. 4.

It should be noted in this connection that the statute provides no separate standard for allegations concerning competitive economic injury as opposed to allegations of other public interest considerations. To the extent, therefore, that appellant relies on Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440, in support of its claim to a hearing, this decision must be construed in light of the subsequent amendments to the Communications Act referred to in the preceding paragraph. Moreover, the Carroll case did not concern the question presented here of the sufficiency of allegations. In that case there had already been an adjudicatory hearing, including an economic in-

^{5/} The post-grant protest referred to was that provided for in the then Section 309(c), which gave the Commission little discretion. See Federal Broadcasting System, Inc. v. Federal Communications Commission, 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563, cert. denied 350 U.S. 923 (1955), holding that what was required of a protest under Section 309(c) was "merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience, and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding." The wording of Section 309(c) was changed somewhat in a subsequent revision in 1956, 70 Stat. 3, at which time Congress also added a clause permitting denial of a requested hearing, if after oral argument, the Commission found that the facts alleged, even if true, presented no grounds for setting aside the grant.

jury issue, and the issue on appeal was the validity of the Commission's ruling that economic injury could not be a relevant public interest factor even if it resulted in public harm. As this Court has stated: "We had no occasion to, [in Carroll] and did not, undertake to say how detailed the protesting licensee's offer of proof must be in order to entitle him to a hearing." KGMO Radio-Television, Inc. v. Federal Communications Commission, __ U.S. App. D.C. __, 336 F.2d 920, 921 (1964).

In sum, Section 309(d), both by its terms and in light of the legislative history, reflects an intention by Congress that a hearing not be required in the absence of substantial factual allegations, allegations which if true establish a prima facie case for denial. The Commission's administration of this requirement here is clearly reasonable. For the Commission went beyond the bare statutory requirements and afforded the petitioner an opportunity to supplement his showing in light of the Commission's determination to require more complete information than that which heretofore had been deemed sufficient to warrant a hearing even though appellant's petition to deny was filed months after the change in policy was first enunciated.

Under the facts of this case it was particularly appropriate for the Commission to insist that assertions of private injury be translated into terms that would indicate a reasonable likelihood that harm to the public, rather than good, would flow from a grant.

For this is not only a case where a hearing would delay the inception of a new service, it is one in which as the result of a grant some 2800 people would receive their first television service and the City of Laredo would be provided with its first competitive service. The applicant was found to be fully qualified and his program service (R. 23-33, 340) was deemed suited to the needs of the area he would serve.^{6/}

In Interstate Broadcasting Co. v. Federal Communications Commission, 116 U.S. App. D.C. 327, 333, 323 F.2d 797, 803 (1963), a separate opinion by Judge Washington (in which the other two members of the panel, Chief Judge Bazelon and Senior Judge Edgerton, concurred) noted the manner in which an existing station may forestall the inception of new service. The issue in that case involved allegations of superior programming rather than economic injury, but what was said there is, we believe, relevant here as well:

"Allegations of this sort are not hard to make -- as witness the advertising pages of any newspaper or magazine. The delays which can thus be produced by a large and well-financed station can readily be imagined . . . Granting Interstate's right to protect itself, its advertising revenues, and its listeners, in every legitimate way, and assuming that its assertions of superior programming are made in complete good faith, one must admit, I think, that the Commission's intention that new service to the public should be favored -- an intention

6/ And to the extent appellant's brief conveys the impression that the controversy here is between an independent station striving to serve a marginal market and a newcomer, supported by revenue from a more prosperous Corpus Christi station, the Court is respectfully referred to our Counterstatement of the case, (p. 2, supra) setting forth the extensive holdings of Southwestern's sole stockholder in radio, television and other mass media.

which is certainly reasonable -- has thus far been effectively thwarted in this case."

The case was remanded in order for the Commission to consider whether reasons existed for waiving an existing rule, but the decision made clear that a hearing was required only if, all things considered, a grant of the application would be precluded if the truth of the allegations were established. 116 U.S. App. D.C. at 332, 323 F.2d at 802.

Here, the Commission carefully considered the need for a hearing and held that the facts alleged were "too generally stated, speculative, and not sufficiently related to the conclusions drawn by the petitioner" to justify further proceedings. The petitioner made no attempt to particularize the nature of his allegations, although given opportunity to do so. We believe that under the circumstances of this case, taking into account the obvious public benefits that a grant would bring, the degree of discretion the Commission may properly exercise in determining whether or not to hold a hearing, and the indefinite nature of the allegations themselves, (first discussed in the following section of this brief), the agency's judgment was a reasonable one and should not be disturbed.

B. The Information Submitted To The Commission
Failed To Demonstrate That The Public Interest,
As Opposed To Petitioners Private Interest,
Would Be Affected Adversely By A Grant.

KGNS-TV has operated profitably for the last three years. For the past two years its net profits have amounted to \$20,000 annually. (R. 117-118). We would agree that on the basis of the data it submitted there is a likelihood that in the short run, at least, a grant of the K-Six application would adversely affect this financial picture. But we submit that Southwestern has failed to show that the authorization of a first competitive service to Laredo would be injurious to the public.

This Court stated in Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 350, 258 F.2d 440, 444:

. . . We think it is not incumbent upon the Commission to evaluate the probable economic results of every license grant. Of course the public is not concerned with whether it gets service from A or B or both combined. The public interest is not disturbed if A is destroyed by B, so long as B renders the required service. The public interest is affected when service is affected.

Southwestern, while suggesting public injury, has failed to allege facts from which it might reasonably be forecast.^{7/}

^{7/} Appellant makes the claim on page 25 of its brief that some questions which the Commission requested it to answer were not relevant to the claims it had made. While it is true that some of these questions concerned the economics of radio broadcasting, many of the questions, however, were directly pertinent to the issue of alleged economic injury and degradation of programming service to the community. Yet appellant was totally unresponsive to these questions and did not even notify the Commission of its reasons for failing to give this information.

Specifically, appellant made no detailed showing how a grant to K-Six would cause a net loss or degradation of service to the Laredo area, which as this Court has pointed out, is really the heart of a request for a Carroll issue. Appellant stated that it feared a loss of its CBS network affiliation (R. 125-126); that its staff was of minimum size to enable it to provide to the public a "valuable programming service" (R. 128); that it actively solicited and received demands for public service programming (R. 129); and that it broadcasts a substantial amount of live programming on a regular basis to the Laredo area (R. 129). Southwestern also recited an analysis of its locally-produced live programming (R. 130-133). The conclusion was then drawn that since it will lose revenues if K-Six's application was granted, and since its expenses in producing live programming were greater than for other programs, it would have to turn to revenue producing or less expensive items in an effort to offset losses (R. 299-300).

Appellant made no showing, however, of what public service programming, if any, would no longer be carried. It gave no details of any substantial changes in its total program format and policies which might be required as a result of the grant to K-Six. Finally, appellant failed to set forth any other information related to the economics of broadcasting, such as the relationship between any assumed losses in revenue to the withdrawal of particular programs or program services. Information of this kind is essential to a determination whether the authorization of a second service

would result in injury to the public and the Commission's authority to request it is clear. Missouri-Illinois Broadcasting Co., 3 Pike & Fischer, R.R. 2d 232 (1964); KGMO Radio-Television, Inc. v. Federal Communications Commission, supra.

The need for specificity in these matters is particularly important under the facts of this case. For it is undisputed that the area which would be served by the K-Six proposal vastly exceeds that now being served by Southwestern,^{8/} that a first television service would be brought to 2,800 people, and that the amount of local programming proposed exceeds that which is apparently now being carried by KGNS-TV (R. 340). The applicant's local programming consists entirely of educational, religious, news, agricultural and discussion programs, almost all of which are presented on a sustaining (unsponsored) basis (R. 23-33).

Nor can it be argued that Southwestern was not on notice that such information was regarded by the Commission as significant. For this was not the first decision in which an existing television's station claim of destructive economic competition was rejected by the Commission. Its statement in one earlier case is especially relevant here: "The petitioner does not allege that there will be a net degradation of television service to the public in the sense required

^{8/} ". . . An examination of the applicant's proposed Grade B contour compared with that of the petitioner's station reveals that the applicant's proposed Grade B coverage area far exceeds that of the petitioner's station and, in fact, the applicant's proposed Grade A contour is nearly conterminous with the petitioner's predicted Grade B contour." (R. 340).

by the Carroll case in order to raise a legitimate economic issue." KTBS, Inc., 25 Pike & Fischer, R.R. 301, 304 (1963); See also Tri-Cities Broadcasting Co., 24 Pike & Fischer, R.R. 691 (1962). As a result of these cases, appellant should have been aware of the burden incumbent upon it to demonstrate a likelihood of injury to the public. More importantly, the Commission's letter requesting such information constituted actual notice that it would be regarded as pertinent. A copy of the Missouri-Illinois opinion (3 Pike & Fischer, R.R. 2d 232 (1964)) was also enclosed with the Commission's letter to appellant. That opinion plainly stressed that the illustrations of the type of information necessary to support a Carroll issue contained in the original Missouri-Illinois decision (1 Pike & Fischer, R.R. 2d 1 (1964)) were not meant to be all inclusive. Appellant was requested to submit any other information which would aid the Commission in the disposition of the economic injury issue and was fully apprised of the fact that in the absence of additional information, the Commission would act on the application and petition to deny as originally filed.

C. The Commission Properly Requested Additional Information From Appellant Before Determining Whether A Hearing Was Necessary.

A substantial portion of appellant's brief is devoted to an attack on the procedure followed by the Commission on this and a number of other cases subsequent to this Court's KGMO decision. That case upheld the Commission's right to require that a protesting party support a claim of economic injury with specific

allegations of fact sufficient to show what would be proved at a hearing. The Court stated:

In denying appellant's petition for reconsideration, the Commission did not attempt an "all inclusive" statement but gave illustrations of "the type of information" it thought "necessary to support a Carroll issue", including the amount and trend of retail sales in the area, advertising revenue earned and advertising revenue available, whether some business could but do not advertise on radio, the cost of petitioner's public service programming, and the savings that might be made by dropping or moving it.

We think it is within the Commission's authority to require more information than appellant gave. KGMO Radio-Television, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___, 336 F.2d 920, 922.

Since KGMO had not been apprised of the pleading requirements necessary to support an economic injury issue, the Court remanded the case to the Commission to give KGMO an opportunity to amend and amplify its petition. The Commission subsequently issued a Memorandum Opinion and Order containing a list of questions, the answers to which it believed were relevant to support a request for a Carroll issue. Missouri-Illinois Broadcasting Co., 3 Pike & Fischer, R.R. 232 (1964). The questions were simply an articulation of the type of information the Commission originally stated in the Missouri-Illinois case (1 Pike & Fischer, R.R. 2d 1 (1964)) was necessary to support a Carroll issue and which this Court approved in the KGMO case, supra.

When the Commission sent appellant a letter on August 18, 1964 requesting additional information concerning Laredo's ability to support another television station, it also apprised appellant

of the Court's decision in the KGMO case and included a copy of its Missouri-Illinois remand decision, supra. The Commission's letter also stated that in the event Southwestern failed to submit further information, the Commission would act on the K-Six application and petition to deny as originally filed.

Appellant now contends that the Commission has construed the KGMO decision as permitting the agency to set forth a specific set of questions "which must be answered by all Carroll petitioners," irrespective of the facts of the particular case, and absent any answers to these questions, to dismiss the petitioner's pleadings (Br. 20-24). Obviously, this is not the case. The letter of inquiry specifically stated that if no further information were filed the matter would be considered on the basis of the information already submitted. Far from setting up an unlawful standard, the procedure afforded an opportunity for the petitioner to supplement his original claim of injury if he wished to do so. A petitioner who failed to respond naturally assumed the risk that his original submission might be found inadequate. But the underlying purpose of the letter was not to require that evidence be pleaded, as appellant contends, but to give notice of the matters that the Commission has determined are meaningful in assessing the likelihood that public harm will result from a grant, and to allow the objecting station to address its argument to them.

Admittedly, the showing the Commission expects as a result of the policy enunciated in KGMO is more strict than that which it

had required in earlier cases. The reasons, however, were fully set forth when the change in policy was enunciated. In discussing the very matter that is at issue here, the failure to show that a degradation of broadcast service would result from a grant, the Commission stated:

"Even assuming that the petitioner had made sufficient allegations of fact to raise a question as to the ability of the Cape Girardeau area to support a third standard broadcast station, it has not made any adequate allegations to support its claim that there will be a loss or degradation of standard broadcast service to the area. For example, KGMO has alleged that it would have to curtail or discontinue certain specific public service programming, or move such programming to other time periods in order to make the 'more desirable time segments' available for sale for commercial purposes. However, it gives no facts concerning the costs involved in broadcasting such programs, or the time segments which such programs now occupy, or the savings which it would expect to effect by dropping or moving such programming. . . . Finally, no facts have been alleged which indicate that the new station and the other standard broadcast station licensed to Cape Girardeau will not be able to operate in such manner as to maintain the existing quantity and quality of standard broadcast service.

Although the foregoing recitation of the type of information we deem necessary to support a Carroll issue is not all inclusive, the Commission considers it to represent a fair approach to the difficult question of determining when a hearing is needed to investigate the possibility that additional competition, normally favored, will in fact be harmful to the public. This does not mean that a petitioner must plead its evidence; however, we do require that a petitioner allege facts which are sufficiently related to the economics of broadcasting, including the specific relationships between any assumed losses in revenues to the withdrawal of particular programs or program services, to raise a substantial question as to the ability of the area involved to support another broadcast station without loss or degradation of service to the public. Although we recognize that it may be more difficult to plead specific facts in support of an economic issue than it is with respect to other issues, we cannot

accept a recitation in extremely general and speculative terms. For, inability to make persuasive allegations is indicative of a probable failure of proof at a subsequent hearing, and we do not wish to delay a grant otherwise fully in the public interest without good cause." Missouri-Illinois Broadcasting Co., 1 Pike & Fischer, R.R. 2d 1, 4 (1964).

We believe that this statement sets forth an approach to the question of economic injury to existing stations that is well within the Commission's permissible discretion, 47 U.S.C. 309(d),(e), Carroll Broadcasting Co. v. Federal Communications Commission, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958); KGMO Radio-Television, Inc. v. Federal Communications Commission, supra, and that the considerations it enunciates justified the Commission's action here denying the Southwestern petition.

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D. The Commission Has Not Made Any Arbitrary Departure From Fixed Policy In Denying Appellant's Petition To Deny.

Appellant claims (Br. 19) that the Commission has suddenly imposed a higher standard for pleading economic injury issues, and the Commission's denial of its pleadings was "all the more arbitrary" when compared with practices the Commission follows in other areas of licensing, particularly with respect to authorizations of microwave relays designed to serve Community Antenna Television Systems (CATV's) (Br. 29-30). To support the former claim Southwestern relies on a series of recent Commission decisions enumerated by Commissioner Cox in his dissent in Missouri-Illinois Broadcasting Co., 1 Pike & Fischer, R.R. 2d 5 (1964), and for the latter, Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963) is cited. Both contentions are without merit.

In the first place, all the Commission decisions relied upon as authority for the proposition that the Commission has imposed a higher standard for pleading Carroll issues, were all adjudicated prior to the KGMO decision, supra. As we have previously stated, that case set forth the precise kind of information necessary to support a Carroll issue. It is well settled that the rule of stare decisis is not applicable to Commission decisions and that, accordingly, a reasonable decision is not rendered invalid because it indicates some change in policy.

Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 227-228 (1946); Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 U.S. App. D.C. 383, 385, 174 F.2d 38, 40 (1949); Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S. App. D.C. 236, 230 F.2d 204, cert. denied 350 U.S. 1007 (1956). Thus, it is the KGMO decision, supra, that is now controlling and not the previous Commission decisions.

The next point raised by appellant is that the threat of a lost local television service in this case is analogous to situations where the advent of a Community Antenna Television System (CATV) to a community threatens the demise of a local television station (Br. 29-30). It therefore argues that the Commission's treatment of its petition herein was arbitrary when viewed in light of the Commission's policies regarding CATV matters. However, Southwestern has failed to show that the present situation presents any threat of a lost local television service (See FCC Br. pp. 20-23), and even concedes that the Commission's practices in CATV matters are not governing herein (Br. 29). The Commission has found that CATV poses both a different kind of economic threat to a station, and should it drive the local station out of business, a different kind of injury to the public. For the replacement of one broadcast service by another imposes no hardship on the public, while replacement of a broadcast service by a CATV service carries with it the following injuries: loss of service to rural areas which can't get CATV; loss of service

to city inhabitants who can't afford CATV; and loss of all of the benefits of a local outlet of self-expression. Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963); Tele-Ray Translator System, FCC 64-390 (1964); See also Amendment of the Commission's Rules and Regulations To Permit The Operation Of TV Translator Stations In Conjunction With The Primary Transmitter, 13 Pike & Fischer, R.R. 1561, 1564 (1956); Notice Of Further Proposed Rule Making, and Notice Of Proposed Rule Making, Docket Nos. 14895 and 15233, FCC 63-1128. Due to this inherent difference between the situations, it is only reasonable that the Commission has formulated different procedures for the two different types of situations.

II. THE COMMISSION PROPERLY CONCLUDED ON THE BASIS OF K-SIX'S SHOWING THAT IT HAD ASCERTAINED THE LOCAL PROGRAMMING NEEDS OF THE LAREDO AREA.

Finally, appellant claims that K-Six failed to show what efforts it had undertaken to ascertain the programming needs and interests of its proposed service area, thus requiring the Commission to designate the K-Six application for hearing (Br. 32-34). Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied 371 U.S. 821 (1962). We submit, however, that on the basis of K-Six's showing, the Commission properly concluded that a programming issue was not warranted (R. 340). Suburban Broadcasters, 30 F.C.C. 1021 (1961), aff'd sub nom. Henry v. Federal Communications Commission, supra.

The requirement that broadcasters make an effort to ascertain the programming needs of their service area is well settled Commission policy. In the Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 25 F.R. 7291, 20 Pike & Fischer, R.R. 1901 (1960), the Commission noted that: "We do not intend to guide the licensee along the path of programming; on the contrary, the licensee must find his own path with the guidance of those whom the signal is to serve." Along this line the Commission emphasized that a broadcaster must in good faith make a continuing effort to ascertain the needs of his service area. Clearly, K-Six has done this.

In its pleading K-Six stated that since 1957, its President, Mr. Vann Kennedy, and other staff members have visited, studied, and analyzed the needs of the Laredo community (R. 190). Mr. Kennedy is an experienced broadcaster in the Southern Texas area, and has personal knowledge of the problems of communities such as Laredo. On the basis of these various visits to Laredo K-Six pointed out that it prepared its program schedule. Moreover, subsequent to the filing of the application and because appellant challenged K-Six's proposed programming, K-Six continued its programming survey by conducting extensive interviews with over 35 Laredo community leaders (R. 191). K-Six said that these interviews confirmed that its proposed programming would be responsive to the needs of the Laredo community. To further illustrate its endeavors, however, K-Six also submitted a detailed description of the history of the formulation of one of its locally originated programs -- one not presently available to the Laredo listening public on appellant's station, KGNS-TV (R. 192).

What appellant is really saying is that because K-Six plans to rebroadcast a substantial portion of the programming of station KZTV, Corpus Christi, a question exists whether K-Six's proposed programming is responsive to the needs of Laredo (Br. 34). But appellant's station itself rebroadcasts the signals of a San Antonio station for nearly 90 hours of its weekly schedule (R. 156); and as the Commission found, the percentage of locally originated programming proposed by K-Six exceeds that proposed by KGNS-TV in

its most recent renewal application. Appellant has made no showing that K-Six's programming would not be responsive to the needs of Laredo. And^{it} has alleged no facts which cast doubt on the manner in which these needs were ascertained by K-Six. Although Southwestern seems to imply that K-Six's showing was defective because it failed to state in its application form what steps it had taken to ascertain the programming needs of Laredo (Br. 32), nowhere in the Commission's application form for a construction permit is this information requested or required (R. 23, 32, 34-35). Nor is there anything improper in K-Six's conducting a continuing formal programming survey subsequent to the filing of its application.^{9/} KTBS, Inc., 25 Pike & Fischer, R.R. 301 (1963); See also The Central Connecticut Broadcasting Co., 1 Pike & Fischer, R.R. 2d 639 (1963).

Finally, none of the cases relied upon by appellant on page 34 of its brief demonstrate in any manner that the Commission was arbitrary in denying appellant's request for designation of a programming issue. To the contrary, they indicate that the Commission's action herein was entirely reasonable. For in all the cases relied upon there were either allegations that an applicant had failed to make a survey of the community's programming needs or the applicant, himself, acknowledged that fact. No such charge was made here nor

^{9/} Southwestern states that K-Six has "assumed" that the same programming it now provides on its station in Corpus Christi was suited to the needs of Laredo. Again, appellant makes no argument on this point since it is purely conjecture on appellant's part (Br. 34).

could appellant make such a claim, for in fact and as the Commission found, K-Six made an extensive programming survey of the area (R. 340). Moreover, the Commission has on several occasions denied requests for designation of programming issues where a petitioner has not alleged that no efforts were made to ascertain the programming needs of a community. Hayward F. Spinks, 23 Pike & Fischer, R.R. 181 (1962); cf. WSTE-TV, Inc., 23 Pike & Fischer, R.R. 804, 809 (1962). Consequently, the refusal to designate a programming issue was not unreasonable.

III. SOUTHWESTERN PRESENTED NO OTHER SUBSTANTIAL QUESTION
REQUIRING THE COMMISSION TO OBTAIN ADDITIONAL INFOR-
MATION FROM K-SIX.

Southwestern contends that K-Six submitted conflicting factual information regarding certain aspects of its financial^{AND} programming proposals and that the Commission, contrary to law, refused to seek further clarification (Br. 30-32). We submit that the information before the Commission on these matters was sufficient to establish the applicant's qualifications and that appellant was in no way prejudiced by any alleged inconsistencies in the K-Six proposal.

Specifically, appellant claims that when its original pleadings were filed, it "assumed" that K-Six would not sell local advertising in the Laredo area and that it relied on this fact in its petition to deny. K-Six's opposition clearly set forth the applicant's contentions in this regard. It stated (R. 156):

" . . . in proposing no revenues from the operation of the Channel 13 station during the first year, KSIX was

demonstrating its financial qualifications to operate without revenues at the outset and its readiness to offer the proposed service in the absence of revenues. By so doing it was not saying that it would not 'sell time.' Although the station will be put on the air before a sales staff is established and will be operated for the first year without reliance on advertising revenues, KSIX does intend, when its operation is established, to sell advertising in Laredo and otherwise to operate the Channel 13 station as a fully competitive business. KSIX intends, however, to ease into the Laredo market -- not to crash into it."

Southwestern had full opportunity to amend its petition in light of this information when the Commission requested the submission of further data. It failed to do so, and cannot be heard now to say that any change in K-Six's proposal was prejudicial. Moreover, whether or not, or to what degree, K-Six would seek revenues from the Laredo market had no bearing on its basic financial qualifications since, as the Commission found, entirely apart from this factor, the applicant had demonstrated the availability of such funds as would be necessary to build the station and meet operating expenses.^{10/} (R. 340.)

10/ The Commission's Opinion on this point states:

"The petitioner has stated that operating costs for the proposed new station would probably be close to \$80,000 for the first year, and the applicant has stated that it is willing to have its financial qualifications judged on this basis. Total costs of construction will be \$241,000. To meet the costs of construction, the applicant shows that it has equipment on hand valued at \$100,000, deferred credit available from General Electric Company of \$150,000, cash in excess of \$300,000 and that it will make available to the new station such profits from the operation of the existing station as may be needed. In view of the foregoing, it is apparent that the applicant is financially qualified to construct, own and operate the proposed new television broadcast station." (R. 340.)

Southwestern's contentions with regard to the K-Six staffing proposal are equally insubstantial. The applicant's staffing plans were fully set forth (R. 34). The adequacy of staff proposals depends on the nature of the operation proposed,^{11/} and here the Commission properly pointed out that Southwestern had raised no question in this regard (R. 341), nor, apparently does it do so now. Instead it implies that its own ability to assess the impact of a grant was somehow impaired because it did not know whether K-Six would provide "public service announcements for Laredo." Whether or not such announcements would be carried has no bearing on the question of economic impact since such announcements are not ordinarily revenue-producing (R. 35). The K-Six proposal specifies 905 spot announcements per week, 214 of them being non-commercial. The Commission does not require and the applicant did not furnish a further breakdown along the lines urged by the appellant. But the absence of such specific information hardly calls into question the manner in which K-Six will meet the needs of Laredo. Its representation (R. 62) that it would carry "local originations . . . at Laredo [constituting] 7 hours and 15 minutes of the proposed program schedule and these programs would be primarily of a public service nature," has not been challenged, and as noted elsewhere, the endeavors of K-Six to ascertain the needs of the area have been diligent, and the amount of local programming it proposes exceeds that carried by KGNS-TV.

^{11/} See Kenneth F. Warren, 30 FCC 15, 21 Pike & Fischer, R.R. 158 (1961); Birney Imes, Jr., 27 FCC 225, 17 Pike & Fischer, R.R. 419 (1959).

Clearly, the matters raised by appellant are properly for the consideration of the Commission rather than the Court. Appellant's contentions have been examined by the agency and its determination that no substantial question was presented has not been shown to be unreasonable.^{12/}

CONCLUSION

For the foregoing reasons, the Commission's Memorandum Opinion and Order should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

April 5, 1965

^{12/} For this reason Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, 225 F.2d 511 (1955), is of no avail to appellant (Br. 32). That case required a full inquiry by the Commission where sufficient matters were alleged to warrant a hearing. Appellant cites no case, and we know of none, that stands for the proposition that it is reversible error for an agency to go on to a further investigation on its own motion where the facts before it do not present a substantial question.

18

BRIEF FOR INTERVENOR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

K-SIX TELEVISION, INC.,

Intervenor.

On Appeal from an Order of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

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(i)

STATEMENT OF QUESTIONS PRESENTED

The issues presented by the instant appeal, as agreed to by the parties in a prehearing stipulation accepted by the Court, are correctly set forth in appellant's opening brief.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,061

SOUTHWESTERN OPERATING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

K-SIX TELEVISION, INC.,

Intervenor.

On Appeal from an Order of the
Federal Communications Commission

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

In the interest of conserving the Court's time, intervenor K-Six
Television, Inc. (K-Six) adopts appellee's Counterstatement of the Case.

SUMMARY OF ARGUMENT

In judging the propriety of the Commission's action in authorizing a second television facility in Laredo, without first ordering a hearing on the objections interposed by Southwestern, the following background considerations are to be borne in mind:

1. In 1952, and again in 1959, the Commission considered Laredo's television requirements and concluded that that market, under the "fair, efficient and equitable" mandate of 47 U.S.C. Sec. 307(b), needed two commercial assignments — Channels 8 and 13. Southwestern had knowledge of the 1952 determination when it acquired KGNS-TV (Channel 8) in 1958, and did not participate in the 1959 determination not to shift the then unused Channel 13 elsewhere. In filing for Channel 13 in 1964, K-Six relied on the determinations thus made. The matter of the number of assignments which would provide Laredo with its fair share of television service is one which cannot be relitigated at a time when the heretofore-assigned channels are being applied for. *Coastal Bend Television Co. v. Federal Communications Commission*, 98 U.S. App. D.C. 251, 234 F. 2d 686 (1956); *Van Curler Broadcasting Corp. v. United States*, 98 U.S. App. D.C. 432 (1956). And even if that prior determination is not *res judicata*, appellant's allegations must be appraised, in any event, in the light of the fact that Southwestern was seeking to relitigate matters on which the Commission had already twice passed.

2. With competition generally favored, and more particularly in mass media areas, any pleading which would have the effect of prolonging Southwestern's present television monopoly in Laredo should be scrutinized with care. *Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470, 474 (1940); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Interstate Broadcasting Company v. Federal Communications Commission*, 116 U.S. App. D.C. 327, 333, 323 F. 2d 797 (1963).

3. In amending in 1960 the 1952 "protest" provisions of the Communications Act, Congress sought to obviate wasteful, costly, and dilatory proceedings. To that end it required the complainant to "make a case." 47 U.S.C. Sec. 309(d); cf. *Interstate Broadcasting Company v. Federal Communications Commission*, 116 U.S. App. D.C. 327, 333, 323 F. 2d 797 (1963).

4. When Southwestern sought to raise a *Carroll* issue against the activation of a channel heretofore expressly assigned to Laredo, Southwestern had ample notice of a recent change in Commission policy — that the Commission would not hereafter designate for hearing on economic grounds an application for a new facility absent a detailed showing of injury to the public. That policy change has since been sanctioned by this Court. *KGMO Radio-Television, Inc. v. Federal Communications Commission*, ___ U.S. App. D.C. ___, 336 F. 2d 920 (1964).

5. When judged in the light of the foregoing considerations, it is all too evident that insufficient facts were set forth in Southwestern's pleadings to render an evidentiary hearing obligatory on the generalized objections there interposed. Though told that its allegations were insufficient and though afforded another opportunity "to make its case" (R. 335-336, 347-351), Southwestern spurned the tendered offer (R. 337).

ARGUMENT

INSUFFICIENT FACTS WERE ALLEGED BY SOUTHWESTERN TO RENDER A HEARING OBLIGATORY

The propriety of the Commission's action in authorizing a second television facility in Laredo, without first ordering an evidentiary hearing on the objections interposed by Southwestern, is to be appraised against several background considerations:

1. Prior Commission Determinations Regarding Laredo's Needs.

— In 1952, after four years of extensive rule-making proceedings, the Commission in its *Sixth Report* (1 R.R. 91:601) adopted a television allocation table (now Rule 73:606) designed to provide "a fair, efficient, and equitable" apportionment of television service "among the several States and communities", in accordance with the Congressional mandate embodied in 47 U.S.C. Sec. 307(b). *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954).

There it was concluded that the needs of Laredo would be served and that the public interest would be furthered by assigning *two* commercial channels to Laredo, namely, VHF Channels 8 and 13. Under the rules there adopted, the channels thus allocated to Laredo were available for use in that community by any qualified applicant, and such assignments could be neither shifted elsewhere nor deleted except through a subsequently instituted *rule-making* proceeding. *Ibid*, p. 344.

The 1952 determination thus made by the Commission that Laredo needed two television stations of its own was again reviewed and reaffirmed in a 1959 rule-making report. *Channel Assignments in Corpus Christi*, 18 R.R. 1793 (1959). There, at a time when the Commission was endeavoring to find a third VHF channel for Corpus Christi, the suggestion was advanced by Coastal Bend Television Company that Laredo's then dormant Channel 13 assignment should be shifted to Corpus Christi. In rejecting that suggestion, opposed by the Mayor and by the President of the Chamber of Commerce of Laredo, the Commission stated (18 R.R. 1793, 1798 (1959)):

As to the deletion of the channel at Laredo, we do not believe that, where another alternative is available, we should consider the deletion of that city's second VHF assignment, which would in all probability leave the area for the indefinite future with only one United States television station.

Thus, on two occasions prior to the one now under review, the Commission passed on Laredo's television needs, and found that the public interest would be served by *two* facilities in that community.

When appellant's predecessor put Channel 8 on the air in Laredo in 1956, and when Reynolds through Southwestern purchased that facility in 1958, they were fully aware that a second VHF allocation was available for use in that market. And in 1959, when Coastal Bend was suggesting in a rule-making proceeding that Channel 13 should be shifted from Laredo to Corpus Christi, Southwestern had every opportunity to urge upon the Commission any reasons why, in its opinion, Laredo's economy would not support two television stations and why Channel 13 should, therefore, be utilized elsewhere. This it did not do. It was not until 1964, after K-Six had filed an application for Channel 13, that Southwestern sought to challenge the underlying conclusions of the Commission, made in 1952 and reaffirmed in 1959, that the public interest would be served by *two* competitive operations in Laredo (R. 134-135, Para. 61; R. 140, Para. 71b).

K-Six seriously questions whether an existing licensee, in connection with an application by another person to activate a *television* channel theretofore allocated to a given community, can relitigate matters passed upon when that allocation was originally made. The number of assignments which will produce an efficient and equitable apportionment of service among the several states and communities is a matter which the Commission resolved when it promulgated its allocation table. In AM (where no allocation table exists) *Carroll*, interference, and like issues are quite properly passed upon for the first time in the processing of an application for a particular facility. But in TV those matters have already been resolved in rule-making proceedings by which the channel in question was allocated to a designated community.¹

¹ See *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 344-345, 210 F. 2d 24 (1954).

Though the instant question whether matters passed upon in a rule-making proceeding can be subsequently relitigated in connection with specific applications has not been heretofore squarely decided, the rationale of numerous decisions of this Court dealing with the Commission's TV allocation table would seem to preclude a person from raising a *Carroll* issue against an applicant for a TV channel already allocated by rule-making to that very market. For example, in the first series of deintermixture cases in this Court (1955-1956), where UHF operators sought to intervene in *adjudicatory* VHF hearings for the purpose of showing that the activation of a VHF assignment in a predominantly UHF market *would mean less service rather than more service to the public* (in essence a *Carroll* issue), this Court sustained the Commission's repeated refusals to permit UHF licensees to participate in or to raise such issues in comparative hearings for the VHF facility. In doing so, this Court placed much emphasis on the fact that the UHF operators had gone into the market knowing that VHF channels were allocated thereto by the 1952 table, and that they were in no position to contend that the activation of those channels would contravene the public interest. *Springfield Tel. Broad. Corp. v. Federal Communications Commission*, 104 U.S. App. D.C. 13, 14, 15, 259 F. 2d 170 (1958). It was only in the case of subsequent VHF "drop-ins", which the UHF operator could not have anticipated, that a stay was issued and then only while television allocation matters were being resolved in rule-making and not in adjudicatory proceedings. *Greylock Broadcasting Company v. United States*, 97 U.S. App. D.C. 414, 231 F. 2d 748 (1956).

As noted in *Coastal Bend*, "an adjudication [or grant] that conforms to the 1952 allocation is valid; the public interest factors which are the only substantive basis of petitioner's attack on the adjudication [namely, that a grant would not encourage the "larger and more effective use of radio" and would contravene the "public interest"] are determined

by the 1952 Report . . .". *Coastal Bend Television Co. v. Federal Communications Commission*, 98 U.S. App. D.C. 251, 255, 234 F. 2d 686 (1956). And this was true, notwithstanding intervening developments which showed that the intermixture philosophy on which the 1952 table was predicated was "a failure." Cf. *Jacksonville Journal Co. v. Federal Communications Commission*, 101 U.S. App. D.C. 12, 13, 246 F. 2d 699 (1957).

In short, the public interest factors which Reynolds and Southwestern sought to urge against K-Six's application for Channel 13 (R. 134-135, Para. 61; R. 140, Para. 71b) had necessarily been determined by the Commission in its previous actions allocating and retaining *two* channels in Laredo. Those public interest factors "had been determined against them in the adoption of the allocations." Cf. *Van Curler Broadcasting Corp. v. United States*, 98 U.S. App. D.C. 432, 436, 236 F. 2d 727 (1956) (per Bazelon, J. dissenting).

Thus, to all intents and purposes, when K-Six filed an application to activate Channel 13, the need or desirability of a second competitive TV facility in Laredo had already been twice resolved. Those prior determinations are not to be relitigated, particularly where (as here) there was no contention on Southwestern's part that Laredo's economy had markedly retrogressed since 1952. And, even if it be assumed that the Commission, under highly exceptional circumstances, might be required in an adjudicatory hearing to re-examine a determination theretofore made in a rule-making proceeding, it should only do so on the basis of an extremely persuasive and exceptional showing. Cf. *United States v. Storer Broadcasting Co.*, 351 U.S. 196 (1956). In brief, even if not *res judicata*, appellant's allegations must be appraised, as a minimum, in the light of the fact that Southwestern was seeking to relitigate matters on which the Commission had already twice passed.

2. Competition Is Generally Favored. — Generally speaking, the Communications Act recognizes that broadcasters are not common carriers and that the field of broadcasting is one of free competition. *Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470, 474 (1940). Southwestern entered that competitive field in 1958 with its eyes wide open. Cf. *KGMO Radio-Television, Inc. v. Federal Communications Commission*, ___ U.S. App. D.C. ___, 336 F. 2d 920, 924-925 (1964) (per Danaher, J. dissenting). So long as Southwestern owns the sole TV station licensed to Laredo, it has a monopoly in that market.

In business areas in general (other than public utilities) and in mass media fields in particular, competition and divergent news sources are encouraged. *Associated Press v. United States*, 326 U.S. 1, 20 (1945). As noted in *Interstate Broadcasting Company v. Federal Communications Commission*, 116 U.S. App. D.C. 327, 333, 323 F. 2d 797 (1963), the Commission's policy that a new or additional service to the public should be favored is "certainly reasonable."

Accordingly, any pleading which would have the effect of prolonging Southwestern's present monopoly in the Laredo area should be scrutinized with care. Thus, for the Commission in the instant situation to insist on a persuasive and compelling showing that the public interest would indeed be adversely affected by authorizing a second TV operation in Laredo was entirely proper.

3. Section 309(d) Constricts the Situations Where Hearings Are Mandatory. — Under the Communications Act as originally adopted in 1934, the ordering of hearings on objections interposed to applications for additional facilities was largely "discretionary" with the Commission — except in *KOA* and *Ashbacker* situations (47 U.S.C. Sec. 405). In 1952, in adopting the "protest" provisions of 47 U.S.C. Sec. 309(c), Congress went to the opposite extreme — by making a hearing more or

less mandatory in connection with every grant, whenever a competitor submitted "an articulated statement of some fact or situation which would *tend* to show, *if* established at a hearing, that the grant of the license contravened public interest . . .". *Federal Broadcasting System v. Federal Communications Commission*, 96 U.S. App. D.C. 260, 263, 225 F. 2d 560 (1955). And originally, in passing on the need for a hearing, all facts set forth by the protestant had to be accepted as on demurrer. *Federal Broadcasting System v. Federal Communications Commission*, 97 U.S. App. D.C. 293, 297-298, 231 F. 2d 246 (1956). These more or less mandatory hearing procedures were so abused by existing licensees desirous of delaying competition that Congress in 1960 came up with an in-between procedure — giving the Commission less discretion than in 1934 but considerably more than in 1952 (47 U.S.C. Sec. 309(d)). Cf. *Interstate Broadcasting Company v. Federal Communications Commission*, 116 U.S. App. D.C. 327, 333, 323 F. 2d 797 (1963) (per Washington, J. concurring).

In 1960 Congress not only substituted a pre-grant for the former post-grant procedure, but (what is more relevant here) laid down additional conditions which an existing licensee had to meet before he could demand a hearing as of right in connection with an application for a new facility. For example, under 47 U.S.C. Sec. 309(d), as added in 1960, a petitioner is required to set forth "*specific* allegations of facts *sufficient to show*" that he is a party in interest "and that a grant of the application would be *prima facie inconsistent*" with the public interest. Such allegations must be supported by affidavits of persons "with *personal* knowledge thereof." And for the first time an applicant is afforded an opportunity to explain and otherwise place in proper perspective the "facts" set forth by the complainant (47 U.S.C. Sec. 309(d)).

Thus, in *Carroll* situations where on the merits the complainant recognizedly has a "heavy burden,"¹ it is entirely fitting that the Commission insist on a high degree of specificity so as to forestall needless hearings, and this Court has so held. *KGMO Radio-Television, Inc. v. Federal Communications Commission*, ___ U.S. App. D.C. ___, 336 F. 2d 920 (1964). Conclusory allegations which, when analyzed, are mere assertions, beliefs, opinions, intimations, or innuendoes are not sufficient.

4. The KGMO Warning. — In an AM decision released on July 29, 1963, the Commission placed the broadcast industry and the Communications Bar on notice that where an existing licensee seeks to raise a *Carroll* issue, the Commission would not thereafter tolerate generally stated and conclusory allegations, notwithstanding its prior leniency on that score. While the pleading there involved contained a not insubstantial amount of economic data, the Commission noted by way of illustration significant gaps in the resultant showing. *Missouri-Illinois B/Casting Co.*, 1 R.R. 2d 1, 3-4 (1963). Although recognizing that it was more difficult to plead specific facts "in support of an economic [Carroll] issue than it is with respect to other [public interest] issues", the Commission made it clear that it would not hereafter order a *Carroll* hearing bottomed on "a recitation in extremely general and speculative terms." On appeal, though reversing for lack of notice of the policy change thus enunciated, this Court agreed that it was within the Commission's competency to insist on detailed information in connection with requests for a *Carroll* issue. *KGMO Radio-Television, Inc. v. Federal Communications Commission*, ___ U.S. App. D.C. ___, 336 F. 2d 920 (1964).

Accordingly, when Southwestern in March, 1964 sought to raise a *Carroll* issue with respect to intervenor's proposal to activate the second television channel in Laredo, it had ample notice of the Commission's

¹ Carroll Broadcasting Company v. Federal Communications Commission, 103 U.S. App. D.C. 346, 350, 258 F. 2d 440 (1958).

ruling that generalities, assumptions, and innuendoes would not suffice. And though that ruling was then under attack, Southwestern knew on the very day following the filing of K-Six's opposition highlighting the deficiencies in Southwestern's opening pleading that this Court had in effect sustained the Commission's new requirements in this area. *KGMO Radio-Television, Inc. v. Federal Communications Commission*, ___ U.S. App. D.C. ___, 336 F. 2d 920 (May 22, 1964). Thus, in preparing its reply to K-Six's opposition, Southwestern should have been under no delusions that it could slip by with generalized averments. *Tree Broadcasting Company*, 1 R.R. 2d 15 (1963); *KAKE-TV and Radio, Inc.*, 2 R.R. 2d 688 (1964).

And what is even more significant, after this Court remanded the *Missouri-Illinois* case to the Commission to give KGMO a chance to amplify its petition, the Commission elected to afford Southwestern a like opportunity to supplement its original and rebuttal pleadings, and to that end enclosed a copy of its order outlining in substantial detail the type of information needed to justify an economic injury issue (R. 347-351). *Missouri-Illinois Broadcasting Co.*, 3 R.R. 2d 232 (August 4, 1964). By letter dated October 19, 1964, Southwestern advised the Commission that it "will not submit additional information with respect to the K-Six Television, Inc. application" (R. 337).

Hence, it cannot be gainsaid that Southwestern had ample notice of the strict pleading standard which it had to meet in order to raise a *Carroll* issue. In short, with Southwestern afforded *three* opportunities to state its case, it cannot complain if any resultant inadequacies in those pleadings are not condoned.

5. The Insufficiency of Southwestern's Factual Allegations. —

At first blush it would appear that Southwestern's pleadings contained a plethora of economic data (R. 99-140). However, when analyzed in

the light of the background considerations just discussed, and the supplemental matter adduced by K-Six (R. 153-268), numerous gaps in Southwestern's showing become apparent.

When one contrasts the averments regarding Laredo's economy (R. 110-112) and the existence of other competitive media (R. 112-125), as set forth in Southwestern's petition, with those contained in Southwestern's promotion material (R. 251-256) and with further data supplied on these matters by K-Six (R. 205-250),¹ it is all too obvious that Southwestern was engaging in a game of "picking and choosing" the items of information which it was electing to present to the Commission. Southwestern's professed skepticism about Laredo's economy is not only belied by its acquisition of KGNS-TV in 1958, but by its placement of an AM station (KGNS) on the air in that market in 1961 (R. 183).²

Likewise, when Southwestern sought to show that Laredo could not support a second TV station, it carefully limited the population, other business and related figures to *Laredo* proper (R. 110-121). The population, number of television homes, retail sales figures, and income of persons in *Nuevo Laredo*, located just across the Rio Grande and much larger than Laredo, were wholly ignored. It is only when Southwestern starts listing its AM, TV and newspaper competition (R. 112-117) did the not insubstantial size of the Laredo-Nuevo Laredo market become apparent (see R. 176-181, 205-262).

¹ The Court will note that K-Six, throughout its lengthy opposition to Southwestern's petition, went to some pains not to traverse any substantial factual averments which Southwestern had set forth — so as not to raise "a material and substantial question of fact" necessitating an evidentiary hearing (47 U.S.C. Sec. 309(d)(2)). Instead, K-Six supplied additional data designed to place in proper perspective Southwestern's random and selective assertions.

² Donald W. Reynolds and his Southwestern Operating Company are not novices in the broadcasting and mass media fields. They not only own and operate five TV stations (in Arkansas, Texas and Nevada), six AM stations (in Arkansas, Nevada, Oklahoma and Texas), and one FM station (in Nevada), but also some thirteen daily newspapers (in Nevada, Arkansas, Oklahoma, Texas, Alaska, and Hawaii) (R. 154-155).

From a mere skimming of Southwestern's pleading, one is struck with the indefinite and generalized averments: "The trend downward . . . is . . . *indicated*" (R. 111); "The foregoing figures give the *distinct impression*" (R. 112); "The economic difficulties of Laredo are real" (R. 112); "It is *estimated* that approximately \$10,000 monthly is spent by Laredo concerns advertising with Mexican facilities" (R. 114); "It is *believed* that that figure is exceedingly low" (R. 115); "It is alleged upon *information and belief* that KGNS-TV is obtaining roughly the maximum revenues for national and regional accounts possible" (R. 118); "It is also *believed* that Southwestern has reached the point where there is no great likelihood of increasing, to a *meaningful* extent, the amount of [local] revenues" (R. 119); "Southwestern is of the supportable opinion" (R. 123); "There are two courses of action and a combination of both, which *might be* pursued by Southwestern" (R. 127); "It is *difficult to envision* any further [payroll] reduction" (R. 128); etc.

Nowhere did Southwestern make any particularized allegations with respect to which of its programs would be degraded or deleted if K-Six's Channel 13 application were granted. Southwestern adamantly refused to indicate which of its public service programs would be first "to go" (R. 299). Information on these matters was highly relevant to the public interest, inasmuch as K-Six's schedule contemplated roughly as many hours of operation and as much local programming as that provided by Southwestern.¹ As this Court has made clear, the public is not concerned where a new facility is substituted for an existing operation, provided the public continues to receive at least as much

¹ Contrary to Southwestern's assertions below, K-Six did not propose a "satellite" operation for Laredo. In fact, K-Six's proposed local originations exceed those of KGNS-TV, and the Commission so found (R. 340, Para. 4). Southwestern does not argue the contrary here. What is more, as shown by K-Six, Southwestern's programming merits no accolades (R. 263-268).

service as before. *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 350, 258 F. 2d 440 (1958). It is only when the newcomers promise or deliver less that the public interest would be affected. Though Southwestern at one point questioned K-Six's financial qualifications because it misunderstood K-Six's showing on that score, Southwestern has long since abandoned that attack (R. 341). Thus, K-Six is clearly in a position to deliver.

Certainly nothing said by Southwestern regarding the likelihood of KGNS-TV losing its CBS affiliation while retaining its ABC and NBC affiliations established any injury to the public, nor for that matter to Southwestern. The public was not concerned with whether it received some twenty hours of CBS programs from KGNS-TV or those plus more from K-Six's proposed operation. With each of the three networks presently providing approximately 70 hours of network programming weekly, a single station on the air for only 110 hours weekly cannot carry the entire fare of even two networks, not to mention three.

As pointed out by K-Six, of the 90 hours of network programming then carried by KGNS-TV, only 27.2% was devoted to CBS programming, the vast bulk of its network programming (72.8%) being supplied by ABC and NBC (R. 167). In fact, KGNS-TV was not then carrying seven of the top 25 ARB rated CBS programs (R. 167, fn. 2). KGNS-TV's reasons for preferring ABC and NBC over CBS were obvious — with ABC's and NBC's hourly rate to KGNS-TV double CBS's (\$100 as against \$50). Thus, for K-Six to bring a full complement of CBS programming to Laredo will not, despite Southwestern's *intimations* to the contrary, necessarily reduce KGNS-TV's *network* revenues. KGNS-TV will have more air time in which to bring ABC and NBC programming for which it receives more compensation. And with KGNS-TV free to choose between high-rated ABC and NBC shows, it will not want for valuable

adjacencies into which to sandwich *national, regional and local "spots"*.

Nowhere has Southwestern shown in what way the public would be harmed by additional television service to the Laredo area. Nowhere has Southwestern shown why a competitive facility would not be of benefit to the public. Nowhere has Southwestern shown why a monopoly should be longer perpetuated in Laredo, nor why the public should be longer deprived of a viewing choice.

In short, the activation of Channel 13 will make more service rather than less service available to the people of Laredo, and Southwestern has not made a *prima facie* showing to the contrary. And as shown by the record and nowhere disputed, K-Six will not only provide a stronger signal to Laredo and Nuevo Laredo, but (because of greater power and height) it will provide a signal to four times the area served by KGNS-TV, and in doing so it will bring a *first* service to some 2,800 people in Texas, plus unnumbered more south of the Rio Grande (R. 200-202).

CONCLUSION

Intervenor accordingly submits that the Commission's Order granting Channel 13 in Laredo to K-Six Television, Inc. should be affirmed.

Respectfully submitted,

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